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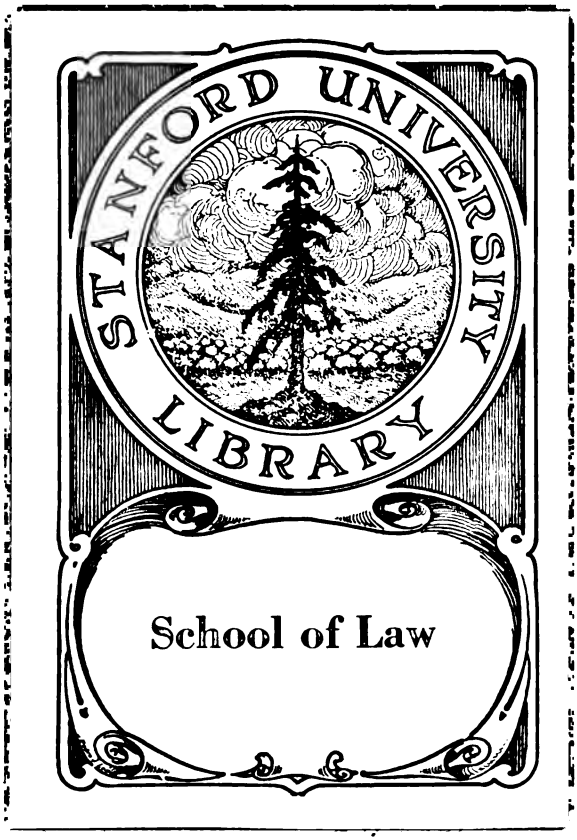

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The Canadian Law Times.

VOL. XXXV. JANUARY, 1915. No. 1.

EIGHTH ANNUAL MEETING OF THE ONTARIO BAR ASSOCIATION.

PRESIDENT'S ADDRESS.

Delivered by F. M. Field, K.C., Cobourg.

We meet under extraordinary conditions; the great Empire, of which we form no inconsiderable part, is at war.

Viscount Haldane, the Lord Chancellor of England, in his splendid address on Higher Nationality, at Montreal, in September, 1913, used these words:

"In the year which is approaching a century will have passed since the United States and the people of Canada and Great Britain terminated a great war by the peace of Ghent. . . . We should steadily direct our thoughts to how we can draw into closest harmony the nations of a race in which all of us have a common pride. . . . If that be now a far-spread inclination, then indeed may the people of three great countries say to Jerusalem 'Thou shalt be built' and to the Temple 'Thy foundations shall be laid.'"

With these noble words ringing in our ears, we had been looking forward with eagerness and enthusiasm to a celebration befitting the culmination of one hundred years of peace between the two great English-speaking nations. The Presidential address of December, 1912, concludes with these words, which can scarcely now be described as prophetic:

"The growing popularity of the Hague Tribunal is gratifying not only to the lawyer but to the world at large. . . . The peaceful message of the lawyer will go on until the ruffianism of war between two countries will be no more tolerated . . . and the lawyer's elysium will be realized.

> "When the war drum beats no longer,
> When the battle flag is furled
> In the Parliament of man,
> The federation of the world."

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Happily for us the ravages of war have been, so far, remote from our borders, but, with the declaration of war on the fourth of August, the possibility of the realization of the dream of the poet has again become remote and our plans for a peace celebration of the Anglo-Saxon communities have been shattered, not indeed, I am glad to say, by any disturbance of that century of peace, but because our thoughts are necessarily engrossed with the conflict, the greatest that history records.

The theme of our war lyric strangely enough lays stress upon the exploits of love rather than of war, and if "Tipperary" stands for the pursuit of happiness rather than the pomp and pageantry of war then indeed may we say just at this moment "It's a long way to Tipperary, It's a long way to go."

However, as with Tennyson in his Vision, and ex-President Mikel in his prophecy, so I am sure each of us will say "My heart's right there."

So much by way of assurance to our distinguished guests from across the border, whose disappointment is doubtless as keen as ours, that the celebration of the century of peace between us must be postponed, not indeed, as I have intimated, because of any rupture of those good relations which we have striven to maintain and value so highly, but because of a little matter of more pressing concern engaging our particular attention just now.

In case the stranger within our gates on this occasion seeing us here assembled as of yore, may entertain a doubt as to what is foremost in the work of this association, I might recall the fact that in this very hall, the call to arms was answered by even a greater rally of the Toronto Bar than we have present this morning. Then was formed the Osgoode Hall Rifle Association, in which I am proud to have been enrolled as a full private. In this very building indeed an indoor rifle range has been installed and regular rifle practice takes place. This military organization has been signally honoured by the Court, over which the Honourable Chief Justice Sir William Mulock presides, adjourning to the Armouries to witness its first review. I believe at the head of the Rifle Association is the Honourable Featherstone Osler, so long a distinguished member of the late Court of Appeal. A notable supporter of the organization is Sir Glenholme

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Falconbridge, Chief Justice of the King's Bench, whose encouraging sentiments have met a warm response. Only the other day, Lieut.-Col. Stewart received from the hands of the Chief Justice of Ontario, the Hon. Sir William Ralph Meredith, the sword that marks his rank as Commander of the Home Guard in this great city.

At a recent meeting of the Special Committee of our Association, having in charge the arrangements for the annual meeting, the son of the late Chief Justice of Ontario, Charles A. Moss, prominent in the profession and public life of this city, attended in khaki uniform—a badge of his enlistment as an officer in training for foreign service. Several members of our Association are in the First Canadian Expeditionary Force, and, among our officers, are sires whose sons are serving the Empire in this great war on European soil, and, in both the armies and navies of Greater Britain, are found sons whose fathers adorn the Bench of this Province, and of the Supreme Court of Canada, one of whom at least, Naval Lieutenant Victor Brodeur, has been in action on His Majesty's ship Berwick, on the occasion of the sinking of the German cruiser Speedwall, maintaining the traditions of that navy whose boast is that its flag has braved a thousand years, the battle and the breeze.

These passing references to activities beyond the realm of law may perhaps be permitted to one like myself still on the Reserve of Officers in His Majesty's Battery of Heavy Artillery at Cobourg, of whose record at this crisis in our history I feel I can be justly proud.

However alluring the topic of war may be, and, no doubt is, the motto in the British Empire and His Majesty's dominions beyond the seas is, I believe, "Business as Usual," and I therefore invite your attention to a few matters that may be deemed noteworthy in the aims, objects and achievements of the Ontario Bar Association.

I find it has been customary for our Presidents to review the history of the Ontario Bar Association from its inception. My predecessors in this office have averred that the Ontario Bar Association was well born and its record so good that its grandfather, the Law Society of Upper Canada, no longer doubts its legitimacy. The proofs of these allegations are to be found scattered through the addresses of Past Presidents, and in the election, as Honorary Presidents of the Ontario Bar Association, of Benchers of the

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Law Society. The courtesies extended to us last year and so kindly repeated this year by the Benchers are a sufficient refutation (if any were needed) that the junior organization is not *persona grata* to the senior. How keenly we all regret that he whose genial presence made the Benchers' luncheon of last year such a successful function is with us no more. The Law Society and the Ontario Bar Association suffered a deplorable loss when the late Sir Æmilius Irving and our late Honorary President, James Bicknell, K.C., were called home, and we feel assured that his successor, Sir George Gibbons, K.C., whom we are glad to greet as Honorary President, recalling our departed colleague, longs with all of us "for the touch of a vanished hand and the sound of a voice that is still."

This is the eighth annual meeting of the Association, and I believe that we start the year 1915 with the largest membership in our history. We believe that the objects of the Association are such as entitle it to the good-will of the whole community and the active interest and support of every member of the profession. These will bear quoting again and are to be found in Article 2 of our Constitution stated in these terms:

"The objects of the Association are to facilitate the administration of justice, to promote reform in the law and procedure, to assist in upholding the honour and dignity of the profession of the law, to bring about united action, to conserve its interest, to encourage interchange of ideas and closer intercourse among members of the profession in Ontario and to maintain friendly relations with the profession in other jurisdictions."

We began the year 1914 with an ambitious programme, much of which we have had the satisfaction of seeing accomplished. The most notable achievement to which this Association lent its active support was the formation of the Canadian Bar Association. It will be recalled that by resolutions of this Association, passed at several successive annual meetings, the desirability of this project was affirmed —not indeed without much debate and some misgivings even on the part of those who favored a National Association. The Manitoba Bar Association took it up with the vigor that characterizes the west, and with Sir James Aikens, K.C., M.P., as sponsor, decision overcame hesitation and more or less nebulous discussion ended in organization.

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It is expected that the first anniversary of the formation of the Canadian Bar Association will be celebrated in Montreal in March, and plans will then be formulated for accomplishing the objects thereof as set forth in the constitution, viz.:

"Its object shall be to advance the science of jurisprudence, promote the administration of justice and uniformity of legislation throughout Canada so far as consistent with the preservation of the basic systems of law in the respective provinces, uphold the honour of the profession of law and encourage cordial intercourse among the members of the Canadian Bar."

Now I can conceive of nothing better calculated to promote that unity among the provinces which is essential to a strong national life than uniformity of legislation. Our forefathers were evidently of that opinion when the Dominion of Canada was formed. Section 94 of "The British North America Act, 1867"—the Constitution of Canada—reads as follows:

"Notwithstanding anything in this Act, the Parliament of Canada may make provision for the uniformity of all or any of the laws relative to property and civil rights in Ontario, Nova Scotia and New Brunswick, and of the Procedure of all or any of the Courts in those Three Provinces and from and after the passing of any Act in that Behalf the Power of the Parliament to make Laws in relation to any matter comprised in any such Act, shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making Provision of such Uniformity shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof."

(I reproduce this with all the capitals as it appears in Volume IV. of "The Revised Statutes of Canada, 1906.")

I do not hesitate to characterize our neglect of the opportunities afforded by this section of our Constitution as a disgrace to a profession, which, while doubtless conservative in the best sense of the term, ought to be and I believe is progressive. Admitting that Quebec must still be excluded from the Provinces wherein uniformity of "Law relative to Property and Civil Rights" is possible of achievement, there remains a vast territory in Canada over which such uniformity can and should prevail. Why should there be in

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the legislation of our Provinces pitfalls for the practitioner of a sister Province in statutes relative to:—

Voluntary and Fraudulent Conveyances,
Assignments and Preferences by Insolvents,
Conveyancing and Law of Property,
Mortgages of Real Estate,
Conveyances, Leases and Mortgages,
Devolution and Distribution of Estates,
Wills,
Insurance,
Trustees and Executors and Administration of Estates,
Bills of Sales and Chattel Mortgages,
Conditional Sale of Goods,
Mechanics' and Wage Earners' Liens.
Wages,
Master and Servant,
Compensation to Workmen for Injuries,
Property of Married Women,
Landlord and Tenant?

The mere enumeration of the more important of such statutes indicates the scope for the work of a competent commission to report on the matter of uniformity of legislation on such subjects.

In the matter of procedure (scarcely less important) the reformer will find abundant opportunity in endeavoring to accomplish uniformity in respect of:—

Arbitrations and References,
Replevin,
Dower,
Libel and Slander,
Limitation of Actions,
Execution,
Absconding Debtors.

It is quite true that our Legislatures in their wisdom have striven to assimilate the laws of the Provinces and much has been done in that direction. We cannot but be encouraged in this laudable enterprise by our observation of the working of Dominion Legislation relating to Bills and Notes, Banks, Insurance, Railways, Patents, Companies and Crimes. At the preliminary hearing of members of the Bars of all the Provinces of Canada held at the Chateau Laurier, Ottawa, in February last, I had the honour of seconding the

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motion made by Mr. J. E. Martin, K.C., Batonnier of the Montreal Bar:

"That . . . it is desirable to form a Canadian Bar Association."

At the inaugural meeting held in Ottawa on the 31st March, I proposed, on behalf of the Ontario Bar Association, seconded by Batonnier Martin of Montreal, the election of Sir James Aikins, K.C., M.P., as President of the Canadian Bar Association. Our late Honorary President, Mr. James Bicknell, K.C., became First Vice-President for Ontario, Mr. E. F. B. Johnston, K.C., being subsequently elected to that office on the demise of Mr. Bicknell. Already Sir James Aikins has started in, with his characteristic industry and energy to inaugurate a new era in law and procedure in Canada. The Manitoba Free Press of 22nd December devotes three columns to the report of the banquet at the Royal Alexandra Hotel under the auspices of the Canadian Credit Men's Trust Association, very largely attended, at which Sir James Aikins presented the case for standardizing laws affecting commercial and financial transactions in the various Provinces.

During this annual meeting I would like to see a resolution carried urging the Ontario Government to co-operate with the other Provinces by making an appropriation to defray the expenses of a special committee of the Canadian Bar Association to grapple with this project.

The most notable event of the year in the narrower field of our own Province is undoubtedly the adoption by the Legislature of Ontario of the Workmen's Compensation Act as prepared by Chief Justice Meredith. As Sir William pointed out in his splendid address, at our last annual meeting, this measure eliminates a large class of damage actions, and involves, therefore, some sacrifice of income on the part of those members of our profession who apply themselves to the work of the Courts. Nevertheless, we greet the legislation with approbation and rejoice with the community in general that our Province thus takes a foremost place in the world in its regard for the welfare of our artisans. We hope and believe it will prove to be a "*monument more enduring than brass*" to the heart and brain of the great Canadian who, regardless of the weight of years, spent much time in gathering information, exchanging ideas, and ascertaining results in Europe and America that the outcome

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of his labours might be worthy of his native Province. When representing our Association at the annual meeting of the New York State Bar Association in January last I had the great satisfaction of hearing Sir William Meredith's draft Bill (not then enacted into law) described by an expert as the most advanced measure of relief ever laid before the legislature of any country. It has relegated to the realm of limbo the intricacies and subtleties of the law of contributory negligence and proximate cause in the vast majority of cases that have heretofore engaged the attention of the Courts and the legal profession in that branch of law. The Toronto Globe of January 1st gave this statute a New Year's greeting in these terms:

"At 12 o'clock last night, the new Act to 'provide for compensation to workmen for injuries sustained and industrial diseases contracted in the course of their employment' came into force. After years of waiting what it is hoped will be the most effective piece of social legislation of its kind in this country is now operating to protect the lives and dependents of those whose earning capacity is impaired through accidents which happen in the daily pursuit of a livelihood. Notwithstanding all the protest and argument that has been occasioned by the promulgation of the rates of assessment to be paid by employers of labour in the Province, the Act will start with an accident fund of about $100,000."

This has been a strenuous year in the history of this Association. There have been five meetings of the Executive Council; the first, on 8th January, when we were the guests of Vice-President W. J. McWhinney, K.C., at his residence; the second, on 10th February, at the University Club; the third, on 24th March, in the Reception Room of the Parliament Buildings, where Cabinet Ministers, the Leader of the Opposition, and several members of the Legislature were our guests; the fourth, on 19th August, at Cobourg; and the fifth on 19th November, at Dunning's Hotel in Toronto. All of these meetings were well attended by members resident in Toronto and elsewhere. At all of these meetings, not the least pleasant feature was the social part, and I cordially concur in the sentimnets so well expressed by Hon. Mr. Justice Hodgins in his address as President in April, 1910:

"There is indeed great need for a closer drawing together of the members of the Bar, not only for the sake of the com-

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mon interests of our strenuous life, but also so that we may not entirely lose what is the greatest charm connected with practice of the law, the intimate companionship of congenial minds and the enjoyment of the lighter and more social side of our incomparable, though jealous, profession."

During the last year the new Surrogate Court tariff of fees has been adopted and some progress has been made with the revision of the rules relating to procedure in the Surrogate Courts. The draft of these rules as submitted to our Executive is somewhat of a disappointment, however as the work indicates a revision without simplification. The Revised Statutes of Ontario, 1914, have come to us as a great relief for which we are grateful.

The trial of divorce cases which has been the subject of much debate at several of our annual meetings, was discussed in Parliament on the resolution of Mr. W. B. Northrup, K.C., M.P.:

"That the same should be taken into immediate consideration by the Government with a view to reform during the present session."

Many influential members, in addition to the mover of the resolution and the Prime Minister, endorsed the resolution, but the result makes it evident, I think, that if our Courts are ever to have jurisdiction to try divorce cases as is done in several of the Provinces, the reform must be obtained with the aid of our Legislature.

During the year, invitations were extended to our Association to send delegates to the meetings of the New York State Bar Association at New York, the Manitoba Bar Association at Winnipeg, the American Bar Association at Washington, D.C., and the Lawyers' Club at Buffalo. Mr. W. J. McWhinney, K.C., represented us at Winnipeg and spoke in enthusiastic terms of his reception there where he advocated the formation of a Canadian Bar Association. Mr. E. J. Hearn, K.C., and other members of our Association, welcomed the Lawyers' Club at Buffalo in Toronto when en route to the Thousand Islands during the summer, and Mr. H. A. Burbidge of Hamilton has since represented our Association at a club dinner in Buffalo. I was delegated to the meetings at New York and Washington, the one at the end of January, the other at the end of October. Both of these meetings were very interesting and the hospitality unbounded. Having regard to the great numbers of the legal

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profession in the State of New York and the United States, one comes back from these meetings to our own, assured that, in proportion to the numbers available, our meetings are quite as well attended as theirs. The Washington meeting was very largely attended, as might have been expected, on account of the many distinguished men that could be conveniently gathered there in those delightful October days. The Honourable Sir Charles Fitzpatrick, Chief Justice of Canada, made an address on "The Constitution of Canada," in the course of which he laid stress upon our position in the Empire which drew forth the applause of the Canadians and a sympathetic cheer from our hosts. Indeed with the assurances received on every hand and the strains of "Tipperary" in our ears we could quite believe the Washington lady's proclamation of "boiling neutrality."

We extend a hearty welcome to the distinguished Judges and members of the Bar from the United States and from the Province of Quebec as well as from our own Province, who have so kindly undertaken to participate in our proceedings by preparing papers and making addresses at the annual banquet. Their association with us at the social functions of these meetings as our guests does much to maintain that enthusiasm without which this organization cannot thrive.

In the eight years of its existence this Association has done enough to justify its organization, but let no one think that nothing remains to be done. Perfection in law and in procedure of the Courts is unattainable in a community such as ours.

> "New occasions teach new duties;
> Time makes ancient good uncouth;
> They must upward still, and onward,
> Who would keep abreast of Truth."

In addition to our Reception Committee, whose duties began at 10 this morning and will end at 6 p.m. to-morrow, we have had Standing Committees at work throughout the year on Law Reform, Legislation, Legal Ethics and Legal History. The Reports of these Committees have been printed for distribution and are now available.

The work of the year has been rendered very agreeable because of the earnest and ablest men who have served on these Committees. I regard myself as most fortunate in having had such support during my term as President. I desire

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to thank you for the honour conferred upon me a year ago in electing me President of the Association, and to wish you one and all, a happy and prosperous New Year. Whatever may happen to us individually, I am sure it will be counted a happy and prosperous year if, in the providence of God, we shall live to see right and justice triumph in the mighty conflict in which we are engaged.

Gentlemen, in conclusion, I commend to the consideration of all of us, in this our time of trouble, those noble sentiments uttered by that great Imperialist, Benjamin Disraeli, Earl of Beaconsfield, in a notable address at Manchester forty-two years ago, as true now as then:

"I express here my confident conviction that there never was a moment in our history when the power of England was so great and her resources so vast and inexhaustible."

And yet, gentlemen, it is not merely our fleets and armies, our powerful artillery, our accumulated capital, and our unlimited credit on which I so much depend, as upon that unbroken spirit of her people, which I believe was never prouder of the Imperial country to which they belong. Gentlemen, it is to that spirit that I, above all things, trust."

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PRACTICAL RESULTS OF THE ADMINISTRATION OF ESTATES OF INSOLVENTS UNDER THE BANKRUPTCY LAW OF THE UNITED STATES.

By Prof. David Werner Amram, of the Pennsylvania Bar.

After having been privileged to read the admirable papers by Mr. James Bicknell [1] and Mr. D. B. Thompson,[2] of your Bar, on the subject of a Canadian Bankruptcy Law, I felt emboldened to suggest to your Corresponding Secretary that I should like to take as the subject of this address the Bankruptcy Law of the United States. It may well be that in so doing, I am but carrying coals to Newcastle. If this be so, and if perchance the subject has been already become familiar to your Bar, I must let my interest in it, based on many years' experience in its administration and observation of its effects, stand as my excuse for troubling you with my thoughts about it.

Certain it is that a study of some of the aspects of the Bankruptcy Law of the United States cannot be entirely without interest to the Canadian Bar, even though my presentation of the topic be condemned as inadequate.

In considering the subject of bankruptcy, one should be careful to distinguish questions of practice from matters of substantive law, and again the legal aspect of the subject from its economic aspect, sometimes in discussions of this subject, these points of view are not clearly distinguished, and one not infrequently hears criticisms of the Bankruptcy Law, based merely upon the insufficiency of some points of procedure, but presented as though the fault lay in the very substance of the legislation. Our Congress is treated with painful regularity to the introduction of Repeal Acts inspired by varying, and not always consistent motives. Some of the opponents of the bankruptcy law belong to that class that is always in the opposition, that is, constitutionally unable to assume any but a merely critical and depreciatory attitude.

Others belong to that class who object to any restraint on the right of the citizen to do as he pleases with his own, and

[1] "The Advisability of Establishing a Bankruptcy Court in Canada," by James Bicknell, 49 Can. L. J. 81; 33 Can. L. T. 35.

[2] "Bankruptcy Legislation in Canada," by D. B. Thompson, 1 Can. L. Rev. 173.

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who would leave the problem of our commercial derelicts and rogues to adjust itself according to some evolutionary process of its own. Letting things alone is their motto. Eventually everything will turn out right. We may well believe that eventually things will all be well, but alas we who are of to-day may derive but little consolation out of the thought of the millenial enjoyment of the life of our remote descendants.

Then, again, there are those in what may be called an anarchic state of mind, a state of mind which resents restraint, not because of a desire to relapse into the freedom of barbarism, but because of an inadequate conception of the true character of the progress of civilization. They honestly believe that by laying aside all legal restraint and putting men back into the state in which every man may do that which is right in his own eyes, they are ushering in the millenium and enabling men to graduate from the ranks of merely highly organized animals in an advanced state of evolution, to the hierarchy of the angels. But it has yet to be proven that the removal of legal restraint tends to make men, not only free, but also good and pure.

But there is a large class of critics of the bankruptcy law who are entitled to receive full consideration in the discussion that they provoke concerning this matter in its every aspect—moral, economic and legal—for they have reasons which they advance with skill and force. I cannot, within the limits of this paper, enter upon a detailed consideration of all that may be said and has been said against the bankruptcy law, though I shall not ignore the principal points of attack, nor fail to present such defence as seems to me to be adequate.

In considering the subject of the bankruptcy law of the United States, it is perhaps proper to begin at the beginning with a short historical review of our legislation. We, in the United States, have from time to time experimented with bankruptcy laws. Our Constitution, adopted in 1789, indicated quite clearly that its wise framers anticipated the need of a national bankruptcy law, and they provided[8] that the National Congress should have the power, among other things, "to establish uniform laws on the subject of bankruptcies throughout the United States." In the exercise of the power thus conferred upon it, Congress has passed four

[8] Constitution of the United States, Art. 1, § 8.

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Acts—the first in 1800, which, after a short career of three years, was repealed in 1803. Thirty-eight years later, the second Act was passed in 1841, also destined to a short career of about thirteen months and repealed in 1843. Twenty-four years later, the third Act was passed in 1867. This Act, after being several times amended, was finally repealed, after a period of eleven years, in 1878. Then for twenty years, the settlement of the affairs of insolvents was again left to the varying, incomplete and unsatisfactory laws of the several States. During all this time, however, there was an incessant demand for the adoption of a national bankruptcy law, on the part of those who recognized in this hurly-burly of State legislation a condition unworthy of a nation with great commercial inerests. It was the creditor class which now demanded the enactment of such a law, not, as theretofore, the debtor class, who had sought to be relieved from obligations resulting from financial panic and industrial depression. Many Bills were introduced and finally the Act now in force was adopted and approved July 1st, 1898. It has now been on the Statute Books for sixteen years. It was amended in 1903 and again in 1910, and it has the approval of the American Bar and the American business world.

Before the adoption of the first of our bankruptcy laws in 1800,[4] the law relating to insolvents was concerned primarily with the seizure of the person and property of fraudulent debtors. The characteristic feature of he modern bankruptcy law, voluntary bankruptcy, was then unknown and indeed impossible, for the bankrupt was always conceived of merely as a trader or broker who had defrauded his creditors. The merely unfortunate merchant seeking relief from a burden too heavy for his shoulders was outside of the sphere of bankruptcy legislation. Furthermore, it was only persons who were engaged in dealing in money and in buying and selling merchandise—the trader, the broker, the merchant—who were subject to be proceeded against in bankruptcy. Under our present bankruptcy law, any person may file a voluntary petition in bankruptcy and only wage earners and persons engaged chiefly in farming and the tillage of the soil are exempt from proceedings in involuntary bankruptcy. All corporations, except municipal, railroad, insurance or

[4] For review of early English legislation prior to the Revolution as well as of the American bankruptcy legislation see Introduction to Remington on Bankruptcy (Ed. 1908).

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banking corporations, may file a voluntary petition and with these exceptions, any monied, business or commercial corporation may be thrown into involuntary bankruptcy.[5]

Our first bankruptcy law of 1800 made little change in the then existing laws of the States. It followed the English bankruptcy law, and it seemed to have been merely an experimental exercise of federal power over the subject of bankruptcy. It was limited by its own terms to five years, but was repealed in 1803. The jealousy of the States in the early years of the American Commonwealth against encroachment on the part of the Federal Government may have had some influence upon the repeal of this law. More obvious reasons existed,[6] among them the failure to provide for the administration of the bankrupt's estate in his home district. At a time when methods of transportation were still primitive, parties to such proceedings had to travel great distances, at much inconvenience and expense, to the seat of the Federal Courts, if they desired to participate in the administration of the bankrupt's estate. This alone would have justified the repeal of the law in those days; and yet this fault was not completely remedied until the adoption of the present Act in 1898. When in 1841, the second bankruptcy law was passed, a notable step in advance was taken, in the introduction of the right of the bankrupt to file a voluntary petition. It was no longer confined to merchants and persons who dealt in money[7] and it contained ample provision for

[5] Act of 1898, § 4.

[6] The reasons for its repeal are thus stated by President Adams. "As this law authorized a majority of the creditors to discharge a bankrupt trader from all his preceding debts, it was regarded by many of the other classes of men as an invidious privilege to the mercantile community, especially in the Southern States, where the agricultural pursuits are predominant; and as it was found that by the power of making discriminations in favour of some creditors, and in fact of making surreptitious creditors, there was no difficulty in obtaining the sanction of the requisite majority for the debtor's discharge, and the law was condemned as affording but too much encouragement to fraud, waste and a rash spirit of adventure." 2 A. & E. Enc. of Law (1st Ed.) 68 note 8. It is interesting to note that although the reasons for the objection to the old law no longer exist, the objection to the present Act of 1898 comes largely from the same section of the country and is based on the same reasons.

[7] "All persons, being merchants, or using the trade of merchandise, all retailers of merchandise, and all bankers, factors, brokers, underwriters or marine insurers," were subject to involuntary proceedings and "all persons whatsoever . . . owing debts which shall not have been created in consequence of a defalcation as a public officer or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity," could become voluntary bankrupts. Act of 1841, § 1.

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the discharge of the honest debtor,[8] for the distribution of the assets among the creditors[9] and the recovery, not only of property fraudulently conveyed, but also of that conveyed by way of preference.[10] It was in 1843, at about the time that the American Bankruptcy Act of 1841 was repealed, that Canada adopted its first bankruptcy law, which by subsequent enactment was continued in force until 1849. It bore the characteristic mark of all early bankruptcy legislation and was limited to traders, a term which was very strictly defined.[11]

Before the third American Bankruptcy Law was adopted in 1867, Canada made a second experiment, and in 1864, a new Insolvency Act was passed, which applied in Lower Canada to all persons. This new legislation had a rather checkered career. The Act of 1864 was repealed in 1869, in which year a new Insolvency Act was passed, applying only to traders, which Act was continued by further legislation until 1875, when again a new Act was passed, which was repealed in 1880.

In the early history of bankruptcy, there is a characteristic similarity between the career of the Canadian and the American legislation—the laws had a short career—were subjected to strong criticism—and repealed apparently without much effort. Perhaps the failure of all the old bankruptcy Acts was due to the fact that both your country and the United States were undeveloped commercially, were largely agricultural and the real purposes of the bankruptcy law were not sufficiently understood by the people.

In the meantime, the great American Civil War had been fought and ended, and again the reasons, which had theretofore been largely prominent in the adoption of bankruptcy laws, came to the front. Unfortunate debtors, the castaways and derelicts of the commercial community, cried for discharge from their obligations. But, in spite of the obvious pressure of this demand on the part of debtors, I believe that a careful study of the history of this law will shew that the real motive for its adoption was the desire to administer the bankrupt estates in an efficient and uniform manner. The popular notion that bankruptcy laws exist primarily for the

[8] Act of 1841, § 4.
[9] Ibid § 10.
[10] Ibid § 2.
[11] Bicknell, 1. c. p. 84.

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discharge of the debtor has not yet been eradicated,[12] and finds its apparent support in the fact that in most cases bankrupt estates pay little, if any, dividends. The thoughtless creditors easily jump to the conclusion that inasmuch as they receive no benefit from the administration of the Act, its real purpose must be the discharge of the debtor, a conclusion which is false, not only in logic, but in fact.[13]

The Act of 1867 contained features for the most part similar to those of the Act of 1841. It provided for the appointment of Registers in Bankruptcy to assist the Federal Judge in performing the duties presented by the Act[14] without power, however, to decide any contested issue of fact or law.[15] Its faults were principally these—the distance of the Courts from the people—the extravagant expense of its administration—the difficulty of obtaining the bankrupt's discharge—and the ease with which debtors could be thrown into bankruptcy, on account of the interpretation of the word "insolvency." Technically, any person was insolvent under the Act of 1867, if he had no cash or quick assets, and, although his reserves and his property might be more than sufficient to liquidate all his indebtedness, the mere fact that they were not immediately convertible into money enabled creditors to throw him into bankruptcy.[16] It will readily be seen that in the time of panic, such a definition of insolvency would make nearly everyone liable to bankruptcy proceedings and indeed, the experience of the great financial panic of 1873 gave the strongest impetus to the movement then already in existence for the repeal of the Act of 1867. The failure of the Act of 1867 may be ascribed to four great

[12] The following resolution was adopted by the American Bankers Association in 1901 (after the act had been in force about two years). "Whereas, The Bankruptcy Act has had time to serve the purpose intended by Congress to give relief to the honest, oppressed debtor, and, whereas, its further operation will entail loss upon both the creditor and debtor and the general public by reducing lines of credit, restricting business and decreasing its general volume, thereby checking the wonderful development of the country promised through right conditions, therefore be it resolved, That this Convention, through the Executive Council of the American Bankers Association, memorialize Congress to repeal the Bankruptcy Law." Though fourteen years have passed since the adoption of this resolution, the Bankers Association has done nothing more toward securing a repeal.

[13] See Essay of Referee James M. Olmstead of Boston "Bankruptcy and Commercial Regulations"—15 Harvard Law Review 829.

[14] R. S. U. S. 4993.

[15] R. S. U. S. 5009.

[16] Black on Bankruptcy, § 173.

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causes, first, the danger of its misuse by creditors against debtors not immediately able to liquidate their indebtedness; second, the difficulties in the way of securing the bankrupt's discharge;[17] third, the distance of the Courts which administered it;[18] and, fourth, the great expense of its administration.[19] Under the combined assault of those who opposed it for these several reasons, the Act was repealed in 1878.

During the twenty years that intervened between the repeal of the Act of 1867 and the adoption of the present Act in 1898, the subject was given much thought and discussion,[20] and it was pointed out that the practical disadvantages of the then existing system could be overcome by appropriate legislation. The task was no easy one, and it required a campaign of education lasting almost twenty years to bring the country to the point of adopting a new bankruptcy law. There are many men in many parts of our country who are to-day as innocent of any real knowledge of the purpose and effect of the bankruptcy law as though tons of printer's ink

[17] In addition to objections to discharge justly based on bankrupt's frauds and perjuries, the Act of 1867 denied the discharge on the ground of negligence in care, custody or delivery of property to the assignee; loss in gaming; failure to keep proper books of account by merchant or tradesman; giving a preference; R. S. U. S. 5110. No discharge was granted after 1869 unless assets were equal to 50 per cent. of liabilities proved against the estate except by consent of majority in number and amount of such creditors. Ibid. 5112.

[18] "The litigation was all, or practically all, in the Federal Courts, generally sitting at a great distance from the debtor, the claimants, and the witnesses. It was the purpose of the present Statute to correct this, and limit the fees and expenses, and have the greater part of the litigation where the parties resided." Per McPherson J.: *In re Wells*, 8 A. B. R. 75; 114 Fed. 222.

[19] "The history leading up to the adoption of the present Bankruptcy Law shews that the great abuses under the preceding national Bankruptcy Act, in the way of exorbitant fees, which largely consumed the assets of the bankrupt, whereby the ministerial officers grew rich upon the administration of the act, while the creditors starved, impelled Congress, in the adoption of the present Bankrupt Act, to reverse this practice . . . The obvious policy of the present act . . . is to reduce to the lowest minimum the expenses of administration. This is especially made manifest in the meagre fees allowed to clerks, referees and trustees. Indeed, so inadequate is the compensation allowed to these officers that it is a matter of happy surprise to the Courts that they have been able to secure the services of such competent persons to fill the places of referees and trustees." *Per* Phillips J.: *In re Harris* v. *Mercantile Co.*, 2 A. B. R. 419; 95 Fed. 123.

[20] Among the numerous measures presented but not passed during this period was an act presented in 1887 which sought to confer jurisdiction on the State Courts. The difficulty aimed at—the distance to the seat of the Federal Court—was remedied by the appointment, under the Act of 1898, of local Referees in Bankruptcy with judicial powers.

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and uncounted reams of paper had not been consumed in attempting to make this subject matter clear to him who would understand it. It is so much easier for some gentlemen in political life to voice the immediate demand of some constituency than to ascertain whether such demand is just or reasonable or practical—whether it has been made before and considered and adopted or discarded, and whether the history of legislation has any lessons worthy of consideration in connection with the matter. The reasons that are sometimes given and publicly voiced for legislation or its repeal are, as gentlemen of the Bar everyone know, often so absurd that one wonders how long a time it really must take before knowledge spreads and sinks into a community so thoroughly that instinctive action on the basis of it becomes possible,[21] or perhaps one wonders whether the community ever does absorb any knowledge and whether our public life is not a series of explosions under more or less temporary impulses, guided to some little extent by the good sense and wise leadership of the few, who, unable to suppress the explosions, must confine their efforts to reducing to a minimum the damage resulting from them. Bankruptcy legislation and attacks upon it are herein subject to the same dangers as any other kind of legislation or public activity.

The condition of affairs between 1878, when the Act of 1867 was repealed, and 1898, when the present Act was adopted, may be briefly reviewed. Every State had its own Insolvency Law, in most of which the principle of "first come, first served," seemed most characteristic. The judgment creditor, armed with the process of the local Court, seized upon everything that the debtor had, so that at public sale by the sheriff, he was thereby paid in full and the rest of the creditors got nothing. Creditors at a distance had no chance at all. Even the local creditors were usually cut out by reason of the fact that the insolvent debtor always preferred some friendly creditor, usually a member of his family, or some other person equally well disposed towards him, to whom a judgment was confessed and with whose assistance the property of the insolvent was seized and taken in execu-

[21] As an illustration of such attacks on the bankruptcy law may be cited the address of the president of the National Wholesale Grocers Association at the annual meeting of the Association in Louisville, Ky., May 19, 1914. Among all the national trade and manufacturers organizations this is the only one known to me in which quite so violent and abusive an attack has been made.

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tion and sold and bought in, usually for the benefit of the insolvent himself. The money for this purpose often came from the insolvent and even when it did not, arrangements were made whereby the friendly creditor was taken care of after the proceedings had been concluded and the excitement had blown over. The creditor class recognized the fact that these conditions were unbearable. To the honest debtor, they were equally unbearable, for he was never discharged from his debts. The result was a restriction in credit and stagnation in business.[22] All of this has been frequently pointed out, but much of it seems to have already been forgotten by many of the persistent opponents of our present American bankruptcy law. The advantage of a national bankruptcy law over local regulations should not require any argument in its support. The burden rather should be placed upon those who argue against a national bankruptcy law. Indeed, one may go further and say that we should have an international bankruptcy law, for commerce to-day knows no national boundaries, and commercial law tends more and more to take on an international character. This being so, how absurd it seems to argue in favour of the regulation of the affairs of an insolvent debtor by the local laws of some comparatively small province or state. The principles of commercial law are broadly speaking uniform throughout the world to-day. There are differences, of course, due to the different origins and different systems—due to local traditions and prejudices and due to differences in procedure, but the student of commercial law realizes the natural tendency toward uniformity in principle, if not in procedure. One of the principal survivals of the era of provincialism in commercial law is the advantage given to the local creditor,

[22] I quote the vivid and forceful language of a business man, Mr. Curtis R. Burnett, in an address delivered by him before the National Association of Credit Men, published in its Bulletin for August, 1914, p. 668, etc. "Many of you here to-day can vividly remember the last period from 1878 to 1898 during which there was no bankruptcy act in existence; those were the happy days for the opponents of the law, and it has opponents galore. Those were the days when the fellow who was 'Johnny on the spot' would pounce down on the poor unfortunate tradesman, back his trucks up to the door, and remove stock, fixtures and everything that was not too hot or to heavy to handle; some of them to my own knowledge would do this in spite of judgments that other creditors might hold, and in some instances they have been known to break into places that bore the sheriff's papers, and take out the goods, then sit tight and fight it out, while the other creditors would whistle for their money, and the whistle was usually all they got; all that was needed was nerve and a shrewd lawyer."

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based on the natural feeling of selfishness which prompts us to protect our own against the stranger. With the breakdown of this provincialism, through the great international agencies of transportation, post office, telegraph and telephone, this fundamental instinct to protect our own against the stranger is not destroyed, but expanded. We recognize by and by that he whom we considered a stranger is only a member of our larger family which embraces all humanity. That it is that practical ethics and commercial instinct both point in the same direction, to the same result—to do unto others as we would have others do unto us. If this be true in the larger international aspect of our problem, how much the more so must it be true when we consider the problem only in its relation to the people within our own national boundaries. Who then will justify laws and regulations which permit the man in Quebec to have advantages in the winding-up of an insolvent's estate over the man in Ontario, or the man in New York over the man in Pennsylvania? In addition to the advantage of a uniform rule of substantive law in these matters, there is the lesser, though not unimportant, advantage of uniform rules of procedure, for as most of our substantive law has sprung from rules of procedure, so through uniformity of procedure, uniformity of sentiment in favour of substantive law may be established. The European and South American States, as well as the United States of America, have national bankruptcy laws, similar in their purposes and larger outlines and differing only in details. How long these differences will last, no one can tell, but it is not improbable that with the changes in world affairs that will follow the great war, commercial law, and with it bankruptcy law, will be internationalized.

Bankruptcy laws have three general purposes, and I state them in the order in which I consider them important:

First, the prevention of fraud.

Second, the discharge of honest bankrupts, and

Third, the distribution of insolvent's assets among his creditors. I am aware of the fact that the general estimate of the importance of these three purposes of bankruptcy laws is precisely the reverse of that which I have stated—that the administration and distribution of the bankrupt's estate is considered most important, and the most important feature of this is the dividend paid to creditors. Dividends must, of course, be made as large as possible, or else, in the

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opinion of the average creditor, the bankruptcy law has failed in its most important purpose. There seems to be some sort of underlying notion that the bankruptcy Court should somehow create assets and give to creditors that, which by the ordinary processes of law, they could not get. But, to me, it seems that the most important purpose of the bankruptcy law is to prevent fraudulent bankrupts from enjoying the fruits of their fraud, and by rigorously subjecting them and their friends and associates to examination, by requiring them to repay to the trustee in bankruptcy the money or other assets which they have attempted to conceal, by preventing them from obtaining their discharge and by using, if necessary, the criminal sections of the Act to punish them. the greatest benefit of a bankruptcy law is given to the community. It may be said that in ordinary cases of honest, but unfortunate debtors, no law is needed, except one for their relief. They, as a matter of fact, are no problem at all to the community, but it is the dishonest debtor who represents great economic waste, and, in so far as a bankruptcy law can prevent him from flourishing, it has performed its most useful function. The prevention of fraud and the discharge of the honest debtor are, therefore, in my judgment, the two most important functions of the Act. The third, to wit, the administration and distribution of the bankrupt's estate equally among the creditors, though of great importance, is, from the point of view of the ultimate effect of bankruptcy legislation, in the third, rather than in the first, rank. The three great purposes of bankruptcy laws may be summed up, therefore, as the prevention of fraud by punishment, the discharge of debtors and equality in the distribution of their estates, or, as Professor Richard Brown puts it, "punishment, rehabilitation and distribution."[23]

[23] Journal of the Society of Comparative Legislation—August, 1910. Mr. Joseph Chamberlain in introducing the English Bankruptcy Act of 1883 stated the two leading objects of the law to be. first the improvement of the tone of commercial morality and the promotion of honest trading. Second the fair and speedy distribution of the assets among the creditors whose property they are. In Professor Brown's article above cited he compares the various systems with respect to their dominant purposes. He says that the leading object of the American system is the release of the debtor: in the English system punishment predominates, although the system of distribution is complete; in the Scottish system distribution predominates, punishment has no place at all except where necessary to obtain disclosure of assets, and rehabilitation is a minor detail and only exists so far as is consistent with the interests of creditors. In an article by W. Wallace entitled "The New Bankruptcy Bill." 25 Juridical Review, 136 (1913), he states that bankruptcy reform in

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The judicial views as to the purpose of the Act are not at all in accord with that which I have herein expressed. The general view is summed up in a statement by Mr. Justice Miller, of the Supreme Court of the United States, who said: "The primary object of a bankruptcy law is to secure a just distribution of the bankrupt's property among his creditors. The secondary object is the release of the bankrupt from the obligation to pay his debts."[24] A few Judges have considered the discharge of the bankrupt the primary purpose of the Act.[25] Obviously, bankruptcy procedure has most largely to do with the taking of possession of the bankrupt's property—the recovery of his assets from third persons—the sale of such assets and their reduction to cash—their distribution among the creditors—and, finally, when it shall have been ascertained that the bankrupt has surrendered all of his assets and has honestly testified concerning his business, granting him his discharge. No doubt, these are important purposes and their importance lies largely in their obvious necessity. But greater than all these is the necessity for prevention of business frauds. The procedure in the administration of a bankrupt's estate may be likened to the care of a sick person, whereas prevention of fraud is more like those larger and far-reaching means that modern science is adopting for the purpose of preventing disease.

It is difficult to understand how any objection can be raised to the principles underlying the three fundamental purposes of a bankruptcy law—honesty, mercy and equality—and yet all of these principles have been declared to be inapplicable. Frauds, it is argued, need not be prevented or punished by such means. Commerce is a species of warfare, in which men contend with each other for advantage. Every man must be prepared to enter the fight prepared to take the risks and to rely on his own good judgment and sound business sense to protect him from the criminality of the persons with whom he is dealing. The bankruptcy law gives to the inefficient creditor assistance which the able and robust business man does not need. It thus protects the weak at the expense of the strong, and has the same faults that

England is generally understood to mean reform in the direction of imposing further or more adequate restrictions of a penal character for fraudulent debtors, for so far as an honest debtor is concerned the law leaves little to be desired.

[24] *Wilson v. The Bank*, 17 Wall. 473; see also *in re Blount*, 16 A. B. R. 97; 142 Fed. 263 and *In re Coffey*, 19 A. B. R. 148.

[25] *Bank v. Katz*, 1 A. B. R. 19.

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hygiene, preventive medicine and the care of abnormal, defective and diseased persons have. It debases the quality of the business community and enables the merchant, who has no proper business acumen or judgment, who is not careful of his credits, and who takes foolish risks, to manage somehow to get along when, according to the ordinary rules which govern the struggles of men for existence, he would surely go under by reason of his own unfitness.

Against the principle of mercy, as applied to the discharge of the honest bankrupt, it is argued that obligations once assumed should not be discharged and that debtors should bear the responsibility which their inability to liquidate their liabilities must entail, and that the only proper, natural and sensible doctrine is the unsentimental one of "woe to the vanquished." Finally, it has been argued, and this is the basis for much of the appeal in favour of local legislation against a national law, that equality is not equity as it is applied in the bankruptcy law, that the vigilant and the active should enjoy the fruits of their superiority —that the protection of others acts in restraint of trade, for unless the merchant feels that he can protect himself by a swift execution, he is unwilling to undertake the risk of extending credit in doubtful cases.

But, though such objections have been made and are from time to time repeated, the point of attack on the bankruptcy law has been shifted to questions of procedure, since the attacks on the principles of the law have proved unavailing. The logic of these attacks may be illustrated by the argument that because juries err and rules of Court are too rigid, and Judges and lawyers get a living out of the legal difficulties of the community, therefore all laws shall be abolished.

In considering the criticisms of bankruptcy laws, I cannot do better than make use of the summary given by Mr. Bicknell in the article above referred to, and to point out how these objections, which were urged in the Canadian Parliament against a bankruptcy law, have been disposed of in our Act of 1898.

First, it was objected that the bankruptcy law gives too great a facility to debtors to make private arrangements with their creditors. This has been made absolutely impossible under the American bankruptcy law, inasmuch as all persons, including the debtor and his wife, are subject to unlimited examination before the Referee in Bankruptcy, either before

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or after adjudication, concerning the acts, conduct or property of the bankrupt, who estate is in process of administration.[26] Private arrangements, therefore, must be publicly aired in the Bankruptcy Court, and, unless they are of such a character as not to offend against those sections of the Act which are intended to prevent preferences and frauds, they must fail in their purpose.

Second, it was objected that the throwing of bankrupts' stocks on the market, through sales by receivers and trustees, deranges business and militates against the honest trader. Against this objection may be offered the experience of sixteen years under the American bankruptcy law, during which time millions of dollars worth of bankrupts' assets have been sold with no apparent effect on the markets or on business. The fact is that, although property may be purchased far below the market rates at bankruptcy sales, it is in turn placed upon the market at prices, which, although somewhat below current market rates, are not sufficiently low to have any material effect—more especially in view of the fact that the proportion of property thus offered for sale to that which is offered in the normal course of business is insignificant.

Third, it was objected that the only person who needs a bankruptcy law is the honest, but unfortunate debtor, and that to him the commercial community will be indulgent without a bankruptcy law. This is true in principle, but false in practice, for the creditors are not by nature merciful, lenient or indulgent, and there is always a minority of creditors who insist upon having the last penny of the pound. Experience has shewn that it is difficult for a man to obtain the consent of all his creditors to a re-organization of his business and to a settlement, whereas under the bankruptcy law the majority in number and amount of the creditors may agree to a composition which, in the absence of fraud on the part of the bankrupt, will be approved by the Court and must be accepted by the minority.[27]

Furthermore, in the absence of a bankruptcy law discharging the honest debtor, he will be forever burdened with the responsibility for the payment of his liabilities, and experience again has shewn that it is unwise to rely on the charitable instinct of creditors, who anciently took the very body of their debtor in satisfaction of the debt and who in

[26] Act of 1898, s. 21 A. *Cameron* v. *U. S.*, 31 A. B. R. 604.
[27] *Ibid* s. 12.

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modern times would exercise over him an almost equal control, by reason of the perpetual fear of their attack upon him as soon as he begins to recover financially from his commercial depression.

Fourth, it is objected that a bankruptcy law, the benefits of which are enjoyed only by traders, induces a great many people to go into business who otherwise would not. Modern bankruptcy laws are not limited in their application to traders and the objection itself is demonstrably a purely theoretical one. No one goes into business because he expects to enjoy the benefits of a bankruptcy law.

Fifth, it is objected that bankruptcy laws encourage rash speculation and induce a great many improvident persons to go into speculation into which they would not venture if they did not know that they could be discharged from their liabilities if they were unsuccessful. This objection is based upon the same fallacy as the one immediately preceding. Only those engage in rash speculation who have the courage or the ignorance which leads them on, coupled with the temperament that finds pleasure in taking chances. This is a matter not to be controlled by any laws and is certainly not encouraged by a bankruptcy law.

Sixth, it has been objected that the bankruptcy law is too expensive in its operation and that in most cases the creditors prefer to enter into deeds of composition in order to get anything at all. It must be admitted that the bankruptcy law is expensive, but it is not too expensive; it is expensive, but not extravagant. The expenses can usually be forecast with reasonable accuracy, for most of them are fixed by law. The commissions of the referee, the receiver and the trustee are fixed by law, the expenses of administration are fixed by rules of Court and all other outlays must be accounted for and justified by the trustees or receivers at meetings of creditors called for that purpose. Any creditor may contest any outlay or proposed expense and require and obtain a judicial determination of its propriety. Most of the outcry against the too expensive administration of the bankruptcy law comes from persons who have never made the least effort to understand the law, its purpose and its methods, or have ever tested the right of any person to fees or expenses paid out in the course of the administration of an estate.

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There is one item in the expense account that is not fixed by law and that probably is the cause of most of the criticism. This is the item of counsel fees. It is practically impossible to fix these by rule, and the law provides that reasonable fees shall be allowed, the amount of which rests largely in the sound judicial discretion of the Court. It is common experience that counsel fees always appear extravagantly large to those who have to pay them. This is all the more true where fees are charged against a fund, the owners of which do not enter into direct and intimate relation with the attorney who makes the demand. The creditors of a bankrupt estate as a rule pay little attention to its administration. They have only the vaguest ideas concerning the work done, the skill displayed, the problems solved by the attorney for the trustee or the receiver, hence when the request for counsel fee is made, it always appears to them exorbitant. They appear to be under the impression that the administration of a bankrupt's estate is comparatively simple and that the sums expended for counsel fees should be very small. A bankruptcy law is from the very nature of things a complicated piece of machinery. A simple bankruptcy law is impossible. There is, of course, a general popular notion that it is possible to do all things very simply if you only are honest and that all laws can readily be reduced to a few general principles which may be administered by any honest man—that technical legal procedure is a nuisance and a superfluity and that every man can, in a well regulated and honestly conceived system, act as his own attorney-at-law and that the whole purpose, or at any rate the entire result of the complicated machinery that legislatures and Courts have evolved, is to obscure the beautiful simplicity of things and provide a system, in which a professional class, whose interests are opposed to those of the general community, may live and move and have its being without in any way contributing to the real progress and benefit of the community. That is the old, old complaint that has been leveled against the law and lawyers since time immemorial and is a survival of the natural revolt of the primitive savage to the artificial but necessary restraints of civilized life in large groups and communities. It is a fact, however, that there is no such thing as a simple truth and that the issues of life are very complicated and the ability to see things in their true relation is so rare that it is akin

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to genius. If truth were simple and readily ascertainable, the jury system would long ago have been developed into a perfect method for the trial of cases; for what can be more certain than that twelve honest men intent on finding the truth shall be able to discover it? But does not our experience of the jury system lead us to quite the opposite view, and have you not, especially in England, in Ontario and in other States that have come under the influence of the English system, largely restricted the scope of the jury in order to minimize the waste and error for which it has been responsible? In order, therefore, that the bankruptcy law shall be properly administered, a high degree of talent is required and I have yet to find any group of men who are willing to give their talents up to any purpose except for a proper remuneration. Lawyers, whose income is made up of fees, will charge in bankuptcy cases in proportion to their ability to earn in other cases. Their time and their abilities have a certain constantly increasing value, if they are able men, and although the services which they perform in a bankruptcy case might have been performed by less eminent practitioners for a smaller fee, this is not the standard by which any Bar has been accustomed to fix its remuneration. It is a demonstrable fact that bankrupts' assets which are managed by successful practitioners are more satisfactorily managed from every point of view than those which get into the hands of incompetents. I have had occasion to preside in the administration of bankrupt estates for nearly twelve years and my thought is that, although it is true that large sums go out of the estates to pay fees and expenses, creditors receive value for such expenditures in the manner in which the business of the estate is administered. The amount of dividends is not materially decreased, because the difference between a large fee and a small one when spread over the entire amount of crditors' claims makes but an insignificant difference in the percentage of the dividend. But it is from the point of view of the creditor expecting a dividend that the size of the fee in the bankruptcy estate is measured. The creditor whose dividend should normally amount to fifty dollars cannot understand why a lawyer in the same case should receive five hundred dollars and thereby cut down his dividend from fifty, let us say, to forty-five. Even if his dividend were not cut down at all, his objection would be just the same, because to him

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the most important function of the bankruptcy law is the creation of dividends. Now, as I have stated before, in my judgment the most important function in the administration of the bankruptcy law is the examination of the bankrupt for the purpose of determining whether he has been honest and, if not, the prosecution of the bankrupt by the means given in the bankruptcy law to punish him for his dishonesty. Whether the creditors get a large dividend or a small one is entirely unimportant beside the question as to whether a bankrupt shall be permitted to practice a fraud successfully, and I urge this, not merely upon ethical grounds, but upon practical grounds such as are apparent to the practical business man. Every fraudulent bankrupt who has been successfully brought to bay is a warning and a guaranty against similar offences and in every jurisdiction it would be most profitable to creditors if they could be convinced that their greatest business good requires them for a certain definite period to give up the hope of dividends in any doubtful case and allow the entire estate to be consumed in prosecution—nay, even to go further and add to the fund belonging to the bankrupt estate by contributing out of their own pockets in proportion to their respective claims. This is the way to prevent fraudulent bankruptcies and it is the fraudulent bankruptcies that cause the great losses to the creditors.[28] This most important part of the work requires the best professional skill and for this the estate must pay, and when lawyers are well paid for such service, it is merely prejudice that would characterize this outlay as extravagance.

Seventh, it is objected that assignees and lawyers are too rapacious—that it is to their interest to prolong the proceedings and increase the expenses—that under the old system at least one man, namely, the man with the first execution in the sheriff's hands, got his pay; under the present system no one gets it; the officials take it all. This objection has been in part considered above. So far as the amount of commissions is concerned, these are strictly fixed by the bankruptcy law.[29] There can be no such thing as an over-

[28] "The trading community does not sufficiently recognize that the dishonest trader is a menace to the community, nor that it is impossible for the honest man who pays a hundred cents on the dollar to compete with the man who frequently fails and pays only a percentage of his debts." from Bicknell's article above cited, p. 94.

[29] Six per cent. on the first five hundred dollars or less, four per cent. on moneys in excess of five hundred dollars and less than ten thousand dollars and one per cent. on moneys in excess of ten thousand dollars, and in case of the confirmation of a composition after

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charge by the receiver or trustee except with the connivance of the Court. The control of the estate is entirely in the hands of the creditors. They can determine how long a business shall be carried on, when it shall be wound up, how and when it shall be sold or otherwise disposed of. Their vote determines the question and neither receiver nor trustee nor their lawyers, no matter how anxious they may be for larger commissions and fees, can in any way stay the decison of the creditors.

Eighth, it has been objected that confining the operation of the bankruptcy law to traders is class legislation—that farmers and other classes of society should be entitled to the privileges of the act. The answer to this objection is that the American bankruptcy law provides as well for the bankruptcy of non-traders as of traders.

Ninth, it is objected that there is no proper supervision of assignees—that there should be government inspectors to supervise all of their acts. This evil has been absolutely suppressed by the method of appointing trustees and their supervision by the Court and the strict accountability to which they are held. I know of only two cases in my experience in which trustees have been unfaithful to their trust. In one case the shortage was completely made up. In the other it was partially made up by payment in cash and by depriving the trustee of all his commissions and counsel fees. In all the other cases that have come under my observation the trustees have faithfully administered the funds in their hands. Under the American bankruptcy law the trustees are appointed by the majority in number and amount of the creditors.[30] They are placed under a bond in an amount fixed by the creditors [31] usually in double the amount of the estimated value of the estate. They are obliged to deposit in official depositories designated by the Court all of the moneys of the estate, subject to the countersignature of the referee.[32] They are obliged to file detailed accounts,[33]

the trustee has qualified, the Court may allow him compensation, not to exceed one-half of one per centum of the amount to be paid to creditors on such composition. By the amendment of 1910, where a business is conducted by the trustee or the receiver, additional compensation may be allowed to them by the Court at a similar rate, but before the allowance of such additional compensation is permitted, notice of the application therefor, specifying the amount asked, shall be given to the creditors by ten days notice by mail. Act of 1898, s. 48.

[30] *Ibid* s 56. *In re Henschel*, 108 Fed. 861: 6 A. B. R. 305.
[31] *Ibid* s. 50 c.
[32] *Ibid* s. 47 a.
[33] *Ibid* s. 47 (5), s. 49.

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which are audited at creditors' meetings.[34] It is obvious that under such a system the possibility of fraud by the trustee is practically eliminated.

Tenth, it was stated as an objection for the unpopularity of the act in Ontario that the creditors could name an assignee outside of the province, while there was no power to bring one who had acted improperly into the province and compel him to account. Under the American bankruptcy law no trustee who resides out of the jurisdiction of the Court can be appointed to that office.[35]

Eleventh, it was objected that at the meeting of creditors one or two of those who held the heaviest claims were appointed inspectors and took good care of their own interests, and that the less fortunate ones suffered. It was also objected that the law did not protect the wage-earners, the mechanic, professional men and all those who worked for the merchant. These objections are met in the American bankruptcy law by the provision that immediately upon the appointment of the receiver or trustee, the Court appoints three disinterested appraisers,[36] who immediately prepare an inventory and appraisement of the estate and file the same in Court. The law also provides that assets cannot be sold, either at public or private sale, until after ten days' notice of a creditors' meeting for the purpose of considering the sale[37] and the approval of the meeting and of the referee or of the Judge.[38] Furthermore the bankruptcy law gives to all workmen, clerks and servants priority over other classes of creditors.[39]

Permit me now to point out the salient features of the bankruptcy law now in force in the United States, namely the Act of 1898 as amended. The law is enforced by the Federal Courts—that is by the District Courts of the United States—not by the State Courts. We have, as you know, a double system of Courts—the Federal Courts administering the law under the Constitution and laws of the United States —the State Courts under the constitution of the United States and the Constitution and laws of the State. The bankruptcy law being created under the Constitution of the

[34] *Ibid* s. 58; G. O. 17.
[35] *Ibid* s. 45.
[36] *Ibid* s. 70 b
[37] *Ibid* s. 58 (4).
[38] *Ibid* s. 70 b.
[39] *Ibid* s. 64 (b) 4.

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United States and enacted by Congress is administered by the Federal Courts—the State Courts have no jurisdiction in bankruptcy.[40] A difficulty immediately suggests itself, namely, the inconvenience of administering the assets of insolvent debtors in a Court which may be far distant from the debtor's place of business or residence. The District Courts of the United States are found in every state in the Union—in many states there are two or more districts and subdivisions of districts, so that terms of Court are held conveniently near to all sections of the state. As a further convenience to parties and witnesses the Act provides for the appointment of referees in bankruptcy, of whom there is practically one for every county in every State,[41] thus overcoming a long standing objection to prior bankruptcy laws. The referee is not merely a ministerial but also a judicial officer, to whom the estate in bankruptcy is referred by the order of the Judge of the District Court and he has exclusive jurisdiction in its administration. He passes judicially upon the claims of creditors—he approves the appointment of the trustee chosen by the creditors to administer the estate. If necessary, he may appoint a receiver to take temporary charge of the estate. He makes all necessary orders for the conduct of the business and the sale of the assets. He determines the right of the creditors to participate in the fund thus created and he declares the dividend to which the creditors are entitled. He determines the right of those claiming priority and adjudicates all controversies that may arise with respect to the assets. Claimants, whose assets were found in the hands of the bankrupt at the time of the bankruptcy, must come before the Referee with a petition for reclamation. Creditors having assets as security may have the value of their securities determined by him. He passes upon compensation of receivers and trustees and after approval by creditors fixes the fees of the attorneys representing the bankrupt and the trustee. He presides at and participates in the examination of the bankrupt and other witnesses. He directs the deposit of the funds of the bankrupt estate in the legal depositories, where they are held subject to his countersignature. In all of these matters his jurisdiction is that of the Court of first instance and unless his orders are appealed from in the manner prescribed by

[40] Federal Judicial Code 1911, s. 256.
[41] Act of 1898, s. 34 (a) 2.

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the Act or by the Rules of the District Court, they are final orders of the Court.[42] Thus it becomes possible to have a local official with both ministerial and judicial functions, clothed with ample authority to efficiently administer the affairs of the bankrupt estate in accordance with a law uniform throughout the United States and rules of practice ultimately laid down by the Supreme Court of the United States and interpreted with substantial uniformity throughout the Union. Referees are appointed by the Judges of the United States District Court for a period of two years,[43] the practice being to reappoint such officers indefinitely—hence referees hold office practically during good behaviour and are thus enabled to develop the necessary skill and expertness that their highly specialized work requires. The case having been referred to a referee, it becomes his duty to call a meeting of creditors,[44] at which meeting he presides. Creditors here present their proofs of claim in proper form, as prescribed, and it is the duty of the referee to pass upon and allow them.[45] Objections made are disposed of by the referee, and the creditors whose claims are allowed are then entitled to participate in the business of administering the estate.[46] Their first business is to elect a trustee. The majority in number and amount of the creditors may appoint any person properly qualified—that is to say, a person who resides within the jurisdiction of the Court[47] and who, in the opinion of the referee, who must approve the appointment,[48] is a proper person for this office. The appointee is placed under proper bond, usually double the amount of the estimated value of the estate—which bond is approved by the referee.[49] The trustee is vested by law with title to all of the bankrupt's assets[50] and we thus have a person succeeding the bankrupt in the control of the estate and representing the creditors, who, although appointed by the creditors and acting in their interests, is responsible to the Court and can practically do nothing without its sanc-

[42] *Ibid* s. 38.
[43] *Ibid* s. 34.
[44] *Ibid* s. 58 b.
[45] *Ibid* s. 57 c, d. *In re Dunlap Carpet Co.*, 171 Fed. 532; 22 A. B. R. 788.
[46] *Ibid* s. 57 d. *In re Brisco Fed. Cas.* No. 1886.
[47] *Ibid* s. 45.
[48] G. O. XIII.
[49] Official Form 26.
[50] Act of 1898, s. 70 a, except exempt property.

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tion. All persons are furthermore protected by the penal bond, which the trustee is obliged to give.

If pending the appointment of the trustee, it becomes necessary in the interest of the estate for its preservation, the District Judge or the referee may appoint a receiver with certain well defined powers.[51] Either the receiver or the trustee, under the order of the Court or referee, may continue the business of the bankrupt if the interest of the estate requires it.[52] If sales are to be made, it becomes the duty of the referee to cause notice to be given to creditors, and indeed it becomes his duty to give notice to creditors of all important steps in the administration of the estate, so that nothing may be done without their knowledge and sanction.[53] No person who comes into the Bankruptcy Court, except a bankrupt himself, is entitled to have a trial by jury and the bankrupt is entitled to have such trial only on two questions—namely, the question of his insolvency and the question of his commission of an act of bankruptcy.[54] He must apply for a jury trial at or before the time within which he is obliged to file an answer to the petition against him—otherwise the right shall be deemed to have been waived.[55] The absence of the jury in the administration of the estate makes it possible to dispose of the business with less regard to technical rules than would be possible if the jury had to be considered. Procedure, while broadly outlined in rules laid down by the Supreme Court of the United States and some of the District Courts, is nevertheless very loose and flexible and as a rule there are no pleadings, except a petition and an answer. Examinations are conducted with regard to the convenience of all the parties concerned and hearings may be continued from day to day or for longer periods of time, as the exigencies of the case require.

Of paramount importance in the administration of the bankruptcy law is the control of the Court over the bankrupt. He is obliged to perform a certain number of prescribed duties,[56] the purpose of which is to assist the Bankruptcy Court in ascertaining, locating and collecting his assets and in determining the extent and nature of his liabili-

[51] *Ibid* s. 2 (a) 3.
[52] *Ibid* s. 2 (a) 5.
[53] *Ibid* s. 58; *Birkett* v. *Columbia Bank*, 12 A. B. R. 691; 195 U. S. 345.
[54] *Ibid* s. 19 a; *In re Herzikoff*, 121 Fed. 544; 9 A. B. R. 745.
[55] *Ibid*.
[56] *Ibid* s. 7.

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ties. He is obliged to submit to an examination before the Judge or a referee concerning his acts, conduct or property, upon the application of any officer or creditor, and any other person, including the bankrupt's wife, may be similarly subjected to an examination concerning these matters, at the instance of such officer or creditor or at the instance of the bankrupt himself.[57] This examination of the bankrupt or any other witnesses may be conducted at any time after the petition in bankruptcy is filed—either before or after he has been adjudicated a bankrupt and before or after any issue has been framed for a trial before the Judge or referee. The examination is an inquisitorial one and may take a wide range, subject to the discretion of the referee.[58] The conscience of the bankrupt and the other witnesses may be searched practically without limit and the results of such an examination depend entirely upon the skill and persistence of the examining lawyers. My own experience of many years as referee in bankruptcy has led me to the conclusion that there is practically no case in which creditors will fail to ascertain the truth concerning the bankrupt's affairs, if they use the instrument fashioned for them by the bankruptcy law for digging into the history of the bankrupt's commercial life. Complaints have been made against the efficiency of the law in this respect. It fails only where attorneys are ignorant or slothful or creditors too indulgent or too greedy. The greedy creditor, who would rather accept an offer of composition than pursue an investigation to a finish, is often responsible for the apparent failure of the law to bring the facts to light and to punish obvious frauds. The point that I wish to emphasize is this: that barring the constitutional right of the bankrupt not to be compelled to incriminate himself, there is no limit to the investigation of the creditors concerning his affairs, and it is only their own fault if they fail in their object. It is practically impossible for a bankrupt to cover up his acts so skillfully as to prevent his creditors from discovering their real essence.

Who may be a bankrupt and how does one go into bankruptcy? Originally bankruptcy laws were intended for traders only. To-day all persons, natural or artificial, may, under the American bankruptcy law, go into bankruptcy—the only exceptions being certain classes of corporations,

[57] *Ibid* s. 21 a.
[58] *Ibid* s. 7 (a) 9; Black on Bankruptcy, 269.

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such as banks, railroads and the like, for the winding up of which special acts exist.[59] Any such persons may file a voluntary petition in bankruptcy, assigning practically no reason except their inability to pay their debts.[60] If, however, action is to be taken by the creditors to throw such persons into bankruptcy it is necessary that they allege and prove the commission of what are technically known as acts of bankruptcy by the alleged bankrupt.[61] These acts of bankruptcy broadly speaking consist of acts violating or attempting to violate the principles of equality and honesty, which lie at the basis of the bankruptcy law, such as an attempt to prefer one creditor above another or fraud within the meaning of the Statute of Elizabeth. Any three creditors having claims amounting together to five hundred dollars may throw a debtor into bankruptcy, upon alleging and proving an act of bankruptcy.[62] Provision is made for the bankrupt's filing an answer to the petition filed against him and for the trial of the issue thus raised.[63] The adjudication declaring him a bankrupt results in his estate being referred to a referee[64] and the administration proceeding as above outlined.

The discharge of the bankrupt under our law results from a petition filed by him for that purpose, after he has been examined and delivered his assets to his trustee; and he is entitled to his discharge, unless any one of his creditors or his trustee object on account of one of the crimes, frauds or misrepresentations specified in the act,[65] or for his failure to obey any lawful order or answer any material question in the proceedings or where in voluntary proceedings he has been granted a discharge within six years. The bankruptcy law also provides for composition.[66] This, formerly rare, is now a very common method of adjusting bankruptcy proceedings. It enables the bankrupt to take back his estate and continue his business career, whereas in the ordinary administration of the bankrupt estate it would all be sold and the good-will of the business practically sacrificed.

[59] *Ibid* s. 4.
[60] *Ibid* s. 59 a, s. 4 a.
[61] *Ibid* s. 3.
[62] *Ibid* s. 59 b.
[63] *Ibid* s. 18 d.
[64] *Ibid* s. 18 f, g.
[65] *Ibid* s. 14.
[66] *Ibid* s. 12.

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The search for perfection is vanity and vexation of spirit. Why should not the legal and the commercial classes realize the truth of this trite adage in its relation to bankruptcy legislation. Granting that it is not perfect, the American bankruptcy law has been found after sixteen years of thorough testing to be an efficient and serviceable instrument. It enables creditors to get to the bottom of the affairs of their debtor and to punish him for his misdeeds; it enables the honest debtor to obtain an easy and speedy release from his obligations, and it insures absolute equality of distribution of the estate. Every step in the administration of the estate is conducted under the judicial eye and every penny that is expended must have the approval of the creditors and the Court either in advance or by formal ratification after due notice. It is a law which has placed the bankrupt and his affairs in the hands of his creditors in such a manner that none of them can abuse their opportunity. The entire matter is *coram judice* from beginning to end. The examinations are public, free to every creditor and may be conducted until such time as the inquiry is absolutely exhausted and concluded. The debtor is under the control of the Court, and subject to its order even after he is discharged, for he may be recalled whenever necessary for further examination. No creditor can obtain any advantage by preference over any other, and the humbler creditors, the wage-earners, are protected by absolute priority over the others. The law has received the approval of the bar, and the business world in the United States. The approval of the bar is found in the resolutions of the American Bar Association adopted annually [67] and the business world has given its sanction to the law in the resolutions of the National Credit Men's Association [68] representing the business of the

[67] See Reports of the American Bar Association, passim.

[68] "It is the belief of your committee that a growing appreciation of the equality and protection guaranteed by the bankruptcy law has increased the number of its friends and that there prevails at present a preponderance of sentiment among the credit men of the nation favourable to the law and its maintenance as a national measure of equality and protection alike for creditor and debtor" . . . "The creditors are really the trustees charged with the responsibility of managing the property first in their own interest and secondly in the interest of the debtors. The Courts and referees are the agents of the creditors for this purpose." from Report of Committee presented and adopted at 19th annual convention—See proceedings pp. 676-677. The following resolutions were adopted by the Convention:

"RESOLVED, By the National Association of Credit Men in convention assembled, that it reaffirms its belief in the principles of

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entire nation and the National Association of Manufacturers.[69] Insolvency no longer means a multiplicity of law suits, a rush for preference, the ruin of the honest debtor and the success of the fraudulent one. The bankruptcy law prevents these abuses and by taking possession of the debtor and his estate enables the equities of both the debtor and the creditors to be worked out with justice.

Criticism of the bankruptcy law is apt to be the result of experience of one or more cases in which anticipated results were not realized. The value of criticism, therefore, depends very largely upon the extent of the experience that gives rise to it. We may readily admit that the bankruptcy law is not an infallible method and that its administration is at times properly subject to criticism. On the other hand it must not be forgotten that the enormous majority of cases that are disposed of under this law are administered speedily, economically and justly. The cases in which frauds are to be investigated, in which fees and expenses are alleged to

the National Bankruptcy Law for the guarantee of equality and protection in the administration of insolvent estates.

"RESOLVED, That the sincere thanks of the National Association of Credit Men be tendered the United States district judges who have encouraged a relationship with business organizations that will tend to the elimination of certain common evils in bankruptcy administration.

"RESOLVED, That every effort be encouraged through the Association literature and business meetings to have the credit men of the nation assist in improving the administration of the bankruptcy law by taking a direct interest in all bankruptcy cases which concern them as creditors, attending creditors' meetings or arranging for representatives who will act in a genuinely representative capacity.

"RESOLVED, That local associations be urged to appoint properly qualified bankruptcy committees, the purposes of which shall be to observe local bankruptcy conditions, the operation of local bankruptcy Courts, and report to the National office all cases which they sincerely feel are not administered according to the true purposes of the law.

"RESOLVED, That a cordial relationship be encouraged between all of the associations, local bankruptcy Courts and United States district Judges, so that matters affecting the administration of the law can be conferred upon in friendly manner, complaints considered, and a mutual effort carried forward for that equality in administration which will insure the best protection alike to creditor and debtor."

Ibid pp. 677-678.

[69] "RESOLVED, That the National Association of Manufacturers, in convention assembled at this time, does affirm its belief in the efficiency of the National Bankruptcy Law and that it recommends that not only the Association, but all the commercial associations of our country, pledge themselves to assist the bankruptcy Courts in the proper administration of the law, believing that as it now stands upon the federal statutes that the desired results would be obtained for the best interests of all parties concerned if co-operation along the lines indicated can be assured."

See proceedings of 18th Annual Convention (1913), p. 196.

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be extravagant, in which delays and disappointments try the patience of parties in interest are, after all, comparatively few in number, just as the cases that reach the report books are comparatively few out of the enormous number that are litigated. The real test of the value of the bankruptcy law lies in this—that when it is examined in its normal working in the ordinary cases of business failures, it leaves no ground for criticism at all—that in those cases in which delays have occurred, they must be set down as normal incidents in the administration of a good law—that in those cases in which fees and expenses have been found to be extravagant, it is not the law nor its administrators as a whole that are to be blamed and the fault may be traced either to some particular official or some group of negligent creditors who have either abused or failed to take advantage of their rights and privileges and, finally, when we come to examine the cases in which frauds are to be investigated, we find that the Act affords extraordinary opportunities for the purpose of establishing a sanction for business honesty which even those who have no inherent sense of business ethics are bound to respect.

A national bankruptcy law commends itself from every point of view, and it, like all other instrumentalities fashioned to aid society in the solution of its problems, requires the co-operation of wise and just and honest men to insure its success.

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INTERNATIONAL LAW AND THE PRESENT WAR.

By Eugene Lafleur, K.C., Montreal.

Until the outbreak of the present European conflict modern wars have been characterized by an ever increasing recognition of the rules of international law, and it has generally been possible at the end of each conflict to register some substantial progress.

In the titanic struggle between Russia and Japan we had a remarkable instance of the homage paid to the usages of civilized warfare by a nation which had but recently been admitted within the pale of international law. The Japanese army and navy were accompanied by distinguished jurists whose duty was to advise the military and naval commanders as to doubtful questions which might arise in the conduct of the war, just as Gustavus Adolphus was said to have kept a copy of Grotius with him in his camp for constant reference.

What distinguishes the present conflict from all modern wars between civilized states is not merely or principally the deliberate disregard by one of the combatants of almost every one of the principal rules of warfare sanctioned by usage and adopted by the conferences at the Hague, but the negation by the most authoritative and influential writers of that nation of the fundamental principles underlying the science of International Law. Indeed the practice is but the logical result of the doctrine.

So firmly were the foundations of the system supposed to be laid that the late Professor Holland said in 1896, in his work on Jurisprudence, that no one of the States of modern Christendom would venture at the present day expressly to repudiate the duty of conforming to the precepts of International Law in its dealings with the rest. (8th Ed. p. 346).

Contrast with this assurance the answer given in 1914 to another eminent English jurist, Mr. Thomas Barclay, who desired to ascertain the views of one whose opinions have had a determining influence on German military ethics:—

"Any war between the Great Western Powers at the present day can now only be a life or death struggle. No considerations of humanity, of justice, of treaty obligations,

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will interfere with its one great object, which will be to annihilate the enemy's power of resistance. All methods are fair when war is no longer a mere duel, but a death grapple in which, just as teeth and nails are used between individuals, what is equivalent to them is used between nations." (*Edinburgh Review*, 1914, p. 1190.)

Bismarck put it even more tersely and bluntly in his famous saying:—

"Where Prussia's power is in question, I know no law."

(Wo Preussens Macht in Frage Kommt, Kenne ich kein Gesetz).

One of the fundamental principles of International Law is that of the equality of States and the right of each of them to govern itself and to live its own life without interference. Listen to the contempt with which Bernhardi repudiates this doctrine:—

"The weak nation is to have the same right to live as the powerful and vigorous nation. The whole idea represents a presumptuous encroachment on the natural laws of development, which can only lead to the most disastrous consequences for humanity generally."

Starting from this premise the whole system is easily constructed. If there is a state immeasurably superior to all others in civilization, that state alone has rights, while the less civilized states have merely duties of submission and obedience. The obvious privilege of the predominant state is to realize in the highest degree its destiny by imposing its will on less cultured states, and to subjugate them if they offer any resistance. And as some at least of the inferior states may shew a preference for their own civilization, this will generally mean war.

In every text-book that we have ever read the subject of International Law was divided into two parts:

1° Normal relations between states, i.e., in time of peace; and

2° Abnormal relations, i.e., in time of war.

But now we are told that this is all wrong, for war is the normal and peace the abnormal condition of existence. The struggle for existence is the basis of all healthy development and the law of the strong holds good everywhere. The aspiration for peace is directly antagonistic to the universal laws of life, and all efforts directed to the abolition

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of war are not only foolish, but absolutely immoral and unworthy of the human race. The desire for peace has rendered civilized nations anaemic, and war alone can secure to the true elements of progress the ascendancy over the spirits of corruption and decay.

"Might (concludes Bernhardi) is at once the supreme right, and the dispute as to what is right is decided by the arbitrament of war. War gives a biologically just decision, since its decisions rest on the very nature of things."

This invitation to return to nature in order to ascertain the rules of conduct between individuals or nations is not peculiar to modern German philosophers, historians and generals.

The Roman lawyers founded their Jus Gentium on an imaginary Jus Naturale. Grotius and his followers identified the Law of Nations with Natural Law, and Rosseau and his school based their ethics and their sociology on the theory that men must revert to a state of nature in order to be virtuous.

But to the Roman lawyers to live according to nature meant a life governed by the noble precepts of the Stoics, to Grotius is meant the reign of equality and justice, and to Rosseau an idyllic existence free from competition, jealousy or strife.

Of course, their hypothesis was historically false. Their was far more truth in the doctrine of Hobbes that "the natural state of men, before they entered into society, was a mere war and that not simply, but a war of all men against all men." (Liberty, par. 12.) For, as he tells us, "the most frequent reason why men desire to hurt each other, ariseth hence, that many men at the same time have an appetite to the same thing; which yet very often they can neither enjoy in common, nor yet divide it; whence it follows that the strongest must have it, and who is strongest must be decided by the sword." For these reasons, Hobbes concludes that in the natural state, the *bellum omnium in omnes* is practically perpetual, and, he quaintly adds, "the time remaining is termed peace."

The premises, therefore, of the modern apostles of brute force is true, namely, that the evolutionary course of nature is a history of competition and strife.

But the extraordinary deduction which they draw is that instead of seeking our rules of conduct in the conceptions

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of a higher form of life which has been developed by ages of progress, we must go back to the predatory habits of the jungle.

No one could repudiate such an inference more forcibly than the evolutionists themselves. Spencer, in the concluding volume of his philosophy, says that his views will not be agreeable to those who follow the apostle of brute force in thinking that, because the rule of the strong hand was once good, it is good for all time. (Data of Ethics, p. 257.)

Having shewn by science that there should be a privileged nation, untrammelled by the restraints imposed on less favoured states, the next step is to prove by the aid of history that the Germans are the chosen people, destined to become the rulers of the world and to establish the *pax Germanica,* that armed peace which will deter all rivals from any attempt to break it any more. This destiny is manifest from the time when Arminius or Herman hurled back the legions of Varus, and although Teutonic pre-eminence has been occasionally obscured by the Hellenic and Latin civilizations, these were ephemeral triumphs of nations doomed to a swift decadence.

It may seem incredible that such crude theories should have any effect on the conduct of a nation in the practical affairs of life. As Mr. Sidney Low observes, in a recent contribution to the subject in the Edinburgh Review (1914, p. 272): "In England, all the dangerous ethics and fantastic ethnology of perverted geniuses would only have set us talking. In Germany, they seem to have induced quite a large number of otherwise sane and sensible persons to believe that any war would be righteous if it were waged to impress upon a sceptical and reluctant world the consciousness of German superiority."

The surest way in which the theories of philosophers can be transmitted into practical maxims of conduct is to incorporate them in the instructions of a Government to its military and naval commanders. If we turn to the German War Manual, we find the following guiding principle enunciated:—

"A war conducted with energy cannot be confined to attacking the combatants of the enemy and its fortifications. It must at the same time be directed to the destruction of the whole of its intellectual and material resources."

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In other words, all the progress achieved since the Peace of Westphalia in the mitigation of the horrors of war goes for naught, and the military code is that of Tilly and the Duke of Alva. No distinction is made between combatants and non-combatants, between public and private property, between fortified and undefended places. The rule here laid down will authorize the ruthless murder of innocent persons and the wholesale destruction of industrial establishments, libraries, churches and museums, not for any adequate military reason, but for the purpose of weakening the morals of the enemy and destroying his nerve for resistance.

If any doubt existed as to whether German commanders in the field would put this construction on the rule, it would be resolved by their actual conduct of operations in this war and by the unashamed and unrepentant defiance of public opinion displayed by officers of high rank who have expressed their views.

Major-General von Disfurth contributes the following in the "Hamburger Nachrichten":—

"No object whatever is served by taking any notice of the accusations of barbarity levelled against Germany by their foreign critics. Frankly, we are, and must be barbarians, if by this word we understand those who wage war relentlessly to the uttermost degree. There is nothing for us to justify and nothing for us to explain away. Every act of whatever nature, committed by our troops for the purpose of discouraging, defeating and destroying our enemies is a brave act, a good deed, and is fully justified. There is no reason whatever why we should trouble ourselves about the notions concerning us in other countries. Certainly we should not worry about the opinions and feelings held in neutral countries. Germany stands supreme the arbiter of her own methods, which must in time of war be dictated to the world.

"It is of no consequence whatever if all the monuments ever created, all the pictures ever painted, all the buildings ever erected by the great architects of the world be destroyed if, by their destruction, we promote Germany's victory over the enemies who have vowed her complete annihilation.

"War is war, and must be waged with severity. The commonest, ugliest stone placed to mark the place of burial of a German Grenadier is a more glorious and venerable monument than all the cathedrals of Europe put together.

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They call us barbarians. What of it? We scorn them and their abuse. Let them cease to talk of the cathedral of Rheims and of all the churches and all the castles in France which have shared its fate.

"These things do not interest us. Our troops must achieve victory. What else matters?"

To international lawyers who have been taught to look upon public opinion as being, in the last analysis, the final arbiter as to the propriety of the conduct of one state towards another in time of war, the claim now advanced that Germany is the supreme arbiter of her own methods which must be dictated to the world, and the view that a belligerent "should not worry about the opinion and feelings held in neutral countries" will appear to be subversive of all accepted theories and practice.

And what are we to think of a nation which is charged with having needlessly and without any compelling military reason, devastated some of the fairest provinces of Europe, destroyed priceless monuments of architecture and art, pillaged beautiful homes, desecrated churches—and which merely answers: "these things do not interest us."

Let it not be supposed that this attitude is confined to the military caste. No one will suspect Herr Maximilien Harden the editor of "Die Zukunft" who flayed the camarilla about the Kaiser so unmercifully, of any undue prepossessions in favour of the ruling class in Germany. With characteristic courage and independence he advises his countrymen to drop their miserable attempts to excuse Germany's action. "We willed it," he says, "we had to will it. We do not stand before the judgment seat of Europe; we acknowledge no such jurisdiction. Our might shall create a new law in Europe: It is Germany that strikes. When she has conquered new domains for her genius then the priesthoods of all the gods will praise the good war." As regards Belgium he declares that there was never a more righteous war than that which crushed her, and never one which conferred a greater benefit on the conquered. Germany will remain in the Belgian Netherlands, and add thereto the narrow strip of coast as far as Calais. "The object," he says, "is to hoist the storm-flag of the empire on the narrow channel that opens and closes the way to the Atlantic."

(*The Times*, New York.)

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Throughout all these extracts there is one argument which deserves to be noticed. It is urged that all laws of war, whether customary or contractual, cease to be binding in cases of necessity. The German writers distinguish between the ordinary rules of war (Kriegsmanier, or the Etiquette of War) and the necessity of war (Kriegsraison) which overrides these rules whenever their observance would hinder the attainment of the object of the war or place a belligerent in a position of extreme danger. Mr. Westlake characterizes this doctrine as "highly pernicious," and shews that the pretended "necessity of war" is in reality a "necessity of success." He says:—

"It is contended, in effect, however innocent may be the intentions of authors, that the true instructions to be given by a state to its generals are: "'succeed—by war according to its laws, if you can—but, at all events and in any way, succeed.' Of conduct suitable to such instructions it may be expected that human nature will not fail to produce examples, but the business of doctrinal writers should be to check and not to encourage it. Otherwise, the most elementary restraints on war, which have been handed down from antiquity, are not safe." (International Law, Pt. II., pp. 126-8).

But it is not merely theoretical writers who repudiate this view of the necessity of war. If we turn to the admirable "Instructions for the Government of Armies of the United States in the Field," we shall find a very different definition of 'Kriegsraison'—"Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, *and which are lawful according to the modern law and usages of war.*" (General Orders, No. 100, par. 14.)

In the next rule (No. 15) the soldier is reminded that "Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God."

With instructions like these the soldier will take as his Exemplars the humane and chivalrous figures of Bayard, of Washington and Havelock, instead of emulating the hideous records of an Alaric, an Attila or a Gengis Khan.

As we have seen from the foregoing quotations it is not merely the customary law of nations that is denied any bind-

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ing authority, but also the obligations resulting from express contracts. In ancient Rome there was a college of priests (*collegium fetiale*) whose function it was to act as the guardians of the public faith. When any dispute arose with a foreign state it was their province to demand satisfaction, and to determine the circumstances under which hostilities might be commenced and under which existing treaties could be denounced without incurring the anger of the gods. The modern blood and iron chancellors are not hampered by any such preliminaries and their contempt is unbounded for parchment, seals and scraps of paper. Treaties cease to be obligatory from the moment it becomes inconvenient to observe them, and the question of inconvenience is left to the general staff.

It would be impossible to find a more solemn compact than the Regulations respecting the Laws and Customs of War on Land, which formed the subject of the Hague Conferences of 1899 and 1907, and which were signed by nearly all the nations of the world along with an undertaking to issue to their armed forces instructions conformable to the regulations.

It is not my purpose to examine the particular violations of these contractual rules which are alleged to have occurred during the present hostilities. The time has not arrived for a final judgment upon all the infractions which are charged, inasmuch as the enquiry is still proceeding and as it is at present impossible to hold an investigation in which all the parties concerned are represented before an impartial tribunal. Enough materials have been collected, however, and sufficient *prima facie* evidence has been adduced to make it imperative that at the proper time such an investigation should be made. But what I wish to emphasize at the moment is the intolerable pretension of a nation which in advance declines the jurisdiction of the civilized world over its actions, defies public opinion and asserts its intention of disregarding the law of nations and its treaty obligations.

Of the flagrant and deliberate violation of one treaty at least there can be no possible doubt. I refer, of course to that which guaranteed the neutrality of Belgium. A bold and cynical admission on the part of the German Chancellor that this great wrong had been committed because of an alleged military necessity, has been followed by a series of special pleas which have been sufficiently refuted by M. de

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Lapradelle in the December number of the *North American Review*. It was urged, for example, that the treaty signed by Prussia in 1839 was not binding on the Germanic confederation, that by acquiring a colony in the Congo, Belgium had lost its neutral character, and that its neutral status had also been forfeited by arrangements made with Great Britain and France for the preservation of its neutrality in the event of an aggression by Germany.

It may be interesting, before concluding this address, to draw your attention very briefly to some of the debateable problems of international law which recent events have presented for solution.

The question of the employment of automatic submarine contact mines is one upon which a diversity of opinion still exists. The danger to neutral shipping from unanchored mines is obvious, and even when they are anchored there is a likelihood that in rough weather they will shift their position or break adrift altogether. It is said that during the two years which followed the Russo-Japanese war a great number of disasters resulted in the eastern seas from the use of mines by the belligerents. (Westlake, vol. 2, p. 312). At the sitting of the Hague Conference held on the 9th October, 1907, an article was adopted which prohibited (1) the placing of unanchored contact mines not so constructed as to become innocuous an hour at most after those who have placed them have lost control over them, and (2) the placing of anchored contact mines which do not become innocuous as soon as they have broken their moorings. As this convention was to be in force for seven years, it became inoperative on the 9th of October last. And inasmuch as the discussion of the subject revealed a considerable difference of opinion, it seems very doubtful whether even this "emasculated convention" (as Mr. Westlake calls it) would be renewed. Great Britain strenuously argued in favour of the greatest possible restriction of the right to use mines in order to insure the security of neutrals in the navigation of the high seas. The German delegation on the other hand advanced the view that it would be well not to issue rules the strict observance of which might be rendered impossible by the force of things: that military acts are not governed solely by principles of international law but by conscience, good sense and the sentiment of duty imposed by principles of humanity, which would be the surest guides

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for the conduct of sailors and would constitute the most effective guarantee against abuses. And Baron Marschall von Bieberstein, the spokesman of the delegation, added: "The officers of the German navy, I loudly proclaim it, will always fulfil in the strictest fashion the duties which emanate from the unwritten law of humanity and civilization." This certainly sounds a good deal better than the sentiments of Major-General von Disfurth, but the North Sea fishermen and the inhabitants of Hartlepool, Scarborough and Whitby, may be pardoned for thinking that the noble baron had underestimated the degree of "Kultur" of the naval branch of the service.

This brings me to the consideration of another point in connection with bombardments by naval forces. By the first article of the ninth convention of the Hague Conference of 1907, "the bombardment of naval forces of ports, towns, villages, habitations or buildings which are not defended is prohibited."

A second paragraph providing "A locality cannot be bombarded for the sole fact that automatic submarine contact mines are moored before its port," was not assented to by Great Britain, France, Germany and Japan. Mr. Westlake is of opinion (vol. 2, p. 182) that the objection is well founded because "a place cannot be deemed undefended when means are taken to prevent an enemy from occupying it. The price of immunity from bombardment is that the place shall be left open to the enemy to enter."

It seems certain that Scarborough and Whitby were undefended towns in the strictest sense, but there appears to be some doubt whether Hartlepool was not to some extent at least protected by anchored mines.

Still another unsettled question is that of the rights of a belligerent as to the cutting of submarine cables. It was much discussed at the time of the Spanish-American war. There is no doubt as to the right of a belligerent to cut cables connecting different portions of the enemy's territory or cables connecting the territories of the two belligerents. It is equally certain that a cable connecting two neutral territories is inviolable, although by subsequent stages of transmission messages might reach the enemy. But the difficulty arises when a cable connects the territory of the enemy with the territory of a neutral. It appears to be conceded that

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in such case a belligerent is entitled to cut the cable in the territorial waters of the enemy even if the cable should happen to be neutral property, subject to the obligation of indemnifying the owners. This invasion of neutral rights is justified on the ground that neutral property whose *terminus ad quem* is in the territorial waters of a belligerent is subject to the same inconveniences as neutral property on occupied portions of the land of a belligerent.

But the controversy is as to whether the belligerent right can be exercised on the high seas. Against this extension of the doctrine we have the high authority of the late Professor Holland (letter to *The Times,* 21st May, 1898), of Professor von Bar (19 Annuaire, pp. 16, 308, 316) and of the Institute of International Law (19 Annuaire, p. 332). Their view is that a cable connecting a neutral territory with the territory of one of the belligerents cannot be cut in the open sea unless there is an effective blockade.

On the other hand, this view has been vigorously assailed by Mr. Goffin (15 L. Q. R. 145), who suggests that it proceeds upon an erroneous application of the rules of land warfare to maritime warfare. Under the rules governing the latter, he contends that "it would be open to a belligerent to cut a cable beyond the limit of his enemy's territorial waters, just as it would be open to him to seize a despatch boat on the high seas." This contention was also made before the Institute of International Law by the French jurists, M. M. Renault and Lainé, the former of whom pointed out, in line with Mr. Goffin's argument, that ships carrying contraband despatches are undoubtedly confiscable, that at the present day despatches are conveyed, not by boats, but by telegraph, and that "belligerents must find in the new situation an equivalent for the protection which they have lost." The German jurist, Herr Perels, declined to discuss these subtleties and urged that it was impossible to sacrifice the interests of belligerents, because military necessities must be reckoned with, and while the Institute might propose what its members liked, the question was what governments could adopt. (Annuaire, pp. 309-10.)

Mr. Westlake strongly objects to the attempt to impose fresh burdens on neutrals by extending the rules of blockade and contraband, because these rules "are not due to principle, but to compromise, and, therefore, furnish no standing-ground on which an extensive deduction can rest," and concludes that, until some agreement is reached, the general

principles of neutrality "deny to a belligerent, blockade or no blockade, the right of cutting a neutral or neutral-belligerent cable outside territorial waters." (Vol. 2, p. 118.)

At an early stage in the present war, the cables connecting German territory with neutrals were reported as having been severed by the allies, but details are wanting as to the exact place where the cutting was effected, and it is uncertain whether it occurred in the high seas or in a blockaded area.

It has been a pleasure to turn for a moment from the exponents of the new barbarism, what M. Boutrou calls "barbarism multiplied by science" (Revue des Deux Mondes, 1914, p. 398), to the serener atmosphere of legal discussion, where the disputants all acknowledge, outwardly at least, the binding nature of solemn agreements, the supremacy of the law, the claims of humanity and the overruling authority of public opinion.

But now that all our accepted notions are put to the test of a world conflict of unparalleled magnitude and ferocity, now that the great nations of Europe are locked in a struggle for their very existence, we cannot help asking ourselves anxiously whether International Law will survive the ordeal or whether it is destined to be relegated to the category of discarded and discredited sciences. The almost universal reprobation which these excesses have aroused throughout the civilized world, and the firm determination expressed to reinstate the reign of the law, encourage us to believe that the principles of International Law will emerge victorious from the struggle, and rest on a firmer footing than ever. Grotius wrote his great work in the welter of the Thirty Years' War, and in the Prolegomena you will remember the oft-quoted passage:—

"I saw prevailing throughout the Christian world a license in making war of which ever barbarous nations would have been ashamed; recourse being had to arms for slight reasons or no reason; and when arms were once taken up, all reverence 'for divine and human law was thrown away, just as if men were thenceforth authorized to commit all crimes without restraint.'"

Just as the unspeakable horrors of that conflict prompted the great Dutch jurist to write his immortal treatise, so may the present calamity bring forth new efforts for the uplifting and betterment of mankind.

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THE STUDENT AT LAW IN THE EARLY SIXTIES.

By J. E. Farewell, K.C., Whitby.

The student at law in 1860, had at the outset of his career to make the acquaintance of Hugh N. Gwynne, of Trinity College, Dublin, who was Secretary, sub-Treasurer, and Examiner of the Law Society.

He was equipped with medieval trousers, supported by broad suspenders made visible by the absence of a waistcoat as was also his amplitude of stiff shirt front. He wore a collar remarkable for altitude and abundance.

His snow white hair was partially covered by a red wig, reminding one of a gigantic strawberry set on a pile blanc mange. His voice, never to be forgotten by his victim, was shrill and penetrating, even to the bones and marrow of the students.

When he came into the West room on the ground floor of the Law Society quarters accompanied by the gingling of sundry keys and John Molloy, his Aide-de-camp and understudy, there was silence, followed by a brief proclamation, forty-six fifty cash, "bankable bills."

Mr. Alfred Hoskin, afterwards of Cameron, McMichael & Hoskin, Mr. Henry Holland, nephew of Mr. Justice Hagarty, M. C. Galbraith and myself, all hailed from regions close to the newly established Ontario Bank, Bowmanville, which bank had just issued green colored bills. The subtreasurer, professed to be horrified, when we presented some of these bills. He said he wanted "crisp Upper Canadas." He demanded information as to where Bowmanville was, and upon being informed, enquired whether that was not the place where the exploded coal mine was located. He finally accepted the bills, "without prejudice," subject to certain conditions:

First. If we were plucked—a very probable occurrence —it would be all right, if we paid the Examiner's fees in good bills.

Second. If we passed and the Bank of Upper Canada accepted the bills—which to him seemed a very improbable brace of occurrences—it would be alright.

All the fees being paid and Malloy having certified that everybody had writing material for the "Theme," Mr.

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Gwynne opened his mouth and spake, "*Parcenied dextras odi*," "thirty minutes and no copying."

The "Theme" being finished, there followed an oral examination on two books of Horace Odes and two books of Euclid.

My recollection is that he knew all about the Odes of Horace and very little about the two books of Euclid.

Sir James Buchannan MacCauley, D. B. Read, K.C., and the Honourable John Hilliard Cameron, were present, as Benchers, representing the Legal Education Committee.

His method of announcing the "fate" of candidates, was excruciating. For example: Mr. A—— I regret to say has—a long pause—passed. Mr. B—— will have to pay us another visit.

I remember that one Arthur Sturgis Hardy, afterwards Commissioner of Crown Lands, and Provincial Attorney-General and Premier of Ontario, was told that he had not passed—yet—and he regretted to say that the committee had allowed him to attend two weeks later for "another innings," but he could hold out to him no hope. Mr. Hardy "And I, sir, shall be too happy to convince you to the contrary."

As for myself, I was assured, that he much regretted, that I had been—"how sunk my soul," "what blank despair, what horror filled my heart"—passed by the skin of my teeth.

As to legal education we had to keep a certain number of terms during our five years. We were supposed to sit on the back bench of the Court-room, behind the seats of the outer bar and take notes of cases argued in term. The narrow sloping desks are there unto this day to witness.

We had to sign our names every day during term, in a book, at the back end of each Court-room.

Howbeit, very convenient spaces were left between the names by philanthropic students, which, it was hinted, were subsequently filled up by young gentlemen from the country, who had visited Niagara Falls, the Island or elsewhere.

Later on we were compelled to attend a certain proportion of lectures in the examination room in the East wing, given by Edward Blake, Adam Crooks, Mr. J. T. Anderson and Mr. Alex. Leith. Mr. Anderson, to give point to his lectures, indulged in Latin quotations which were always received with thundering applause.

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Owing to the frequent absence—possibly avoidable—of students, several of their friends felt bound to answer for them at roll call. Mr. Edward Blake, would say, when the name of a man of many friends was called, all of whom declared, that the absentee was present. "Gentlemen, this chorus of voices, is really embarrassing." Mr. Adam Crooks, at his lectures, was sceptical—he would require the predecessor, in answering, to stand up and as soon as he had sat down, required the owner of the next name to stand up again—which he did, of course.

The student knew that Mr. Crooks was short-sighted, "and took a long shot." I have a recollection of a very excellent and respectable police magistrate of a city, who passed the ordeal of answering for an absent friend and for himself.

Moot Courts.

In those days a notice was occasionally posted on the door of the lecture room that a Moot Court would be held on a stated evening at which a case which was set would be argued and three students on each side were named as counsel in the case. I remember one case was this: An insurance company insures a vessel. This vessel's Captain discovers a vessel in distress. Boats were sent off to save the lives of its crew. The insured vessel was damaged on the voyage. Was the insurance company liable? Henry Eccles, Q.C., Honourable J. H. Cameron and other eminent counsel used to preside at these arguments.

The establishment of the Law School is familiar to you all. Whether the benefits anticipated from the Law School have been realized is a question.

Students Attending Chambers.

In those days every motion in Chambers had to be made before a Judge.

The Court of Chancery tried the experiment in having certain motions heard before the Judges' Secretary. Mr. T. W. Taylor, afterwards Chief Justice Sir Thomas W. Taylor of Winnipeg, was the first to fill this office. He was succeeded by Richard Porter Stephens who was followed by Mr. George S. Holmested.

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The above named gentlemen acted, only in the matter of motions, in the old Court of Chancery. Finally with the assimilation of Law and Equity practice a Master in Chambers for all the Courts was appointed.

As a means of legal education, the work in Chambers, presided over by a Judge, was a success. The student who went there without knowing where to find the law authorizing the issue of the summons or order he applied for, was pretty sure not to go back again, but if he did go back he knew what he wanted and where his authority for it was to be found. For example:

I remember one youth applied to Mr. Justice Hagarty for a "garnishee order." The Judge expressed his great regret that he had never seen one in his practice, and asked for his authority to issue the same. The student was advised to produce it at the close of Chambers. We lingered to see how our friend would come through the difficulty, and on the Statute as to garnishing debts being presented by him with all confidence, the Judge read it carefully and read, "that the third person and not the Order was to be called the garnishee," and for want of a more appropriate name he suggested that it be called a "garnishing order."

Chief Justice Richards, Vice-Chancellor Esten and other Judges, gave us useful hints and admonitions as to preparation for motion in Chambers.

Mr. M. B. Jackson, the venerable Clerk of the Common Pleas Division, who was in partnership with the Honourable Stephen Richards, had a large Chamber practice. It was generally believed that he slept in Chambers so as to be on hand for the first motion upon their opening. Mr. Justice Osler was a very frequent attendant and was "stout" on Interpleader Orders.

About 1863 the Law Society offered scholarships for the best examination in the different years. I remember that Mr. Thomas Ferguson, afterwards Mr. Justice Ferguson, and Mr. George S. Holmested, the present Registrar of the Supreme Court, were successful candidates.

Shortly afterwards, Messrs. Calvin Brown and E. M. Chadwick greatly assisted the students in passing their examinations by publishing a book, containing all the previous examination papers and the answers thereto.

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THE OFFICERS OF THE COURTS.

There were in those days about the Hall one whom the young fellows feared more than the Judges, namely, the Clerk in Chambers, who always imagined he was busy, very busy, so busy that when copies of affidavits were required from his office frequent pilgrimages thereto were necessary. He frequently used unparliamentary language in addressing us. Once I encountered him, as he emerged from the room near the Old Chambers, formerly occupied by the Master of Titles. I presented my request. He turned upon me and said, "Damn you, don't you know the heir and devisee's agoing." I did not know who or what the "heir and devisee" was or that it was going or where it was going to. I have since learned that it has stopped going. The Act creating it was relegated to oblivion, by one George 5, Chap. 17. After all, W. B. H. was really a kind-hearted fellow, but he was so busy that he never published his book upon the subject, which we used to insist he was a good authority on, namely, "oaths."

Mr. James Cleland Hamilton in his "Osgoode Hall Reminiscences," has carefully collected the names of the other officers of the Court and given many interesting notes about them.

A word as to the Clerks of the Three Courts. Mr. Charles C. Small, the Clerk of the Queen's' Bench, was seldom seen at Osgoode Hall, and when he did come, he had to be carried from his low-wheeled carriage into his office. His duties were most ably performed by his son John, who afterwards represented Toronto at Ottawa and became Collector of Customs.

In the Common Pleas, Mr. Lawrence Heydon was Clerk. He was one of the "four Irishmen" who, with John B. and Wm. Warren and C. C. Holmes, left Kinsale, Ireland, pursuant to agreement entered into at that place and emigrated to Whitby, Upper Canada, with their serving man, Patrick Deshay, to engage in agricultural pursuits therein.

In the Chancery, Mr. Alexander Grant was Registrar. There was no accountant in those days, and rumor had it, that Mr. Grant kept the estate accounts in his hat. He was always so busy that a cheque for payment out of Court required patience and perseverance. You had to follow him and get your foot inside the door. The rapidity with which

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cheques, since Mr. A. B. Murray's administration, are now issued to parties entitled, is one of the most marked features of the improvement of the Administration of Justice.

Mr. A. N. Buell, the Master in Ordinary, will always be remembered for keeping his room very warm. Certain mischievous clerks used to hint that he was anticipating the success of his latter end. They called him the "Egyptian," and Mr. Hennings, his assistant, was called the "Turtle," of the snapping variety. He could and did snap considerably, when young gentlemen insisted that they knew more about practice than he did. They went without a day, etc., and the appointment they came for. In the office of Wilson Patterson and Beattie it fell to my lot to look after a half a dozen ejectment suits in connection with the Smeathman Estate. Captain Smeathman was an officer in the De Watteville Regiment of German mercenaries. He married a Miss McDonald of Toronto and settled some 1,200 acres of land upon his wife. They sailed for England and were never heard of again.

As Captain Smeathman had been a client of Dr. Baldwin he made the squatters of these lands accept a lease from him at sixpence per acre and renewed them from time to time. By his will he devised these lands to his son, the Honourable Robert Baldwin. He continued the practice of renewing the leases. By his will he devised these lands to his executors, William Augustus Baldwin, Lawrence Heyden and John Hector, and as far as they could, they obtained renewals of the leases.

As years rolled by these squatters and their assigns began to question the right of the executors to the lands which they had occupied for so many years, nothing being heard of Captain Smeathman.

One, Pat Henderson, of Yorkville, thought he could acquire the lands and he produced a deed of them from one Abel Conant, who was said to be the owner of the lands.

In Hilary, in the eleventh year of Queen Victoria's reign, Honourable Robert Baldwin commenced a "qui tam" action against him to recover a penalty under 32 Henry, 8 Chap. 9, for traffic in pretended title to these lands, claiming two thousand pounds for Her Majesty and himeslf. He recovered a verdict for five hundred pounds.

Pat Henderson moved against the verdict on account of a defect in the pleadings. The appeal was heard before Sir

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John B. Robinson and Justices Jones and McCauley. Mr. Philpot acted for him, and Adam Wilson for the plaintiff. The verdict was sustained. The case is interesting both on account of the rarety of the action in this province and on account of the decision that there might be amendments to pleadings after a verdict. It is reported in 4 U. C. Q. B. 361. There were injunctions issued by the Baldwin executors to restrain the cutting of timber and divers actions of ejectment which sometimes succeeded. On one occasion Chief Justice Draper presided and he asked why the executors had not added McDonald heir-at-law of Mrs. Smeathman as plaintiff. The counsel replied that every effort had been made to find Mrs. Smeathman and her brother McDonald without success. The Chief Justice said he was certainly alive three or four years previous as he had written to him from Nova Scotia, as a comrade, to assist him in getting his medal for service at the taking of Detroit by General Brock. The Chief applied for the medal and forwarded it to him. It may be remarked that the lawyers in those days gave up their practice and volunteered for the defence of Canada and the Empire. Chief Justice Robinson, Draper, McCauley and nearly every leading lawyer in the Province and even Louis Papineau, afterwards leader of the Rebellion in '37, did the state good service in the last war with the United States.

Leave was given to the Baldwin executors to bring another action adding McDonald or his heirs-at-law as plaintiffs. It was found that McDonald had been drowned in the Bay of Fundy and so five or six actions were commenced by the executors of Robert Baldwin and thirty-seven additional plaintiffs who resided principally in Prince Edward County. I remember that Pat Henderson turned up in the office one day and forbade the carrying on of these actions until he was paid for his land. The generally genial and suave Christopher Salman Patterson fired up and threatened to have him indicted for perjury and fired him out of the office.

And the actions went on. I spent many a day in York and Vaughan hunting up evidence and serving subpœnas, having as an assistant Jimmy McG., a barrister whose business was to supply liquid refreshments to the habituees, of divers taverns in Weston, Kleinberg, Woodbridge, Bolton and elsewhere. I being a young man from the country and

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of the straightest sect of teetotalers could not act in that capacity. We had special juries in three of the cases. Henry Eckles, Q.C., acted for the defendants and Mr. C. S. Paterson for the plaintiffs. We had three days of fighting and obtained verdicts in all the cases. The receipts from the lands for forty years had been very small. The cost of management and many actions and injunctions made a heavy bill of costs, which the thirty-seven plaintiffs refused to pay. An action was brought at Picton to recover the costs, and several generations of office students, but then in practice, were hailed to Picton as witnesses. The Honourable Lewis Walbridge was counsel for the lawyers, and a Mr. Patterson, a partner of Kennith McKenzie, acted for the defendant. The plaintiffs had a verdict and Mr. Patterson left the law and went into the Church, as did also Mr. John T. Anderson, the Law Lecturer, some years afterwards.

These lands were saved for the heirs of Mrs. Smeathman, by Dr. Baldwin's forethought, perseverance and care for his former clients' interest.

This Dr. Baldwin practised medicine, and had in 1803 been called to the Bar under the provisions of an act, providing that the Governor might under his hand and seal appoint, as many of his Majesty's liege subjects, not exceeding six, as from their probity, education and condition in life, he should deem fit and proper to practice the profession of the law.

In the sixties, there were strange clients visiting the law offices. One, Harmar, brought an action of slander against one Numa. The slander being "Who killed the pedlar"? Mr. John T. Anderson, by frequent repetition of the slander, fairly laughed the plaintiff out of Court. The plaintiff used to pay periodical visits, on hot summer days, wearing a heavy fur cap, and distributed to people in front of the office hand bills describing how he had been defrauded of justice.

The day on which Sir John Beverly Robinson was buried the shutters of all the stores on the principal streets were "put up." All the store windows had shutters in those days. The members of the Law Society, the professors and students of Trinity and Toronto Universities attended the funeral, wearing their gowns.

Being the junior, I had to return to the office after the funeral left St. James' Cathedral. Just after I got there,

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an old man came in, and enquired whether this was Sunday or not or what. I informed him that it was not Sunday. He asked what are all the shutters on the windows for? I informed him that they were closed out of respect for Sir John Beverly Robinson, whose funeral was that day. He asked whether this Mr. Robinson had not been some kind of a Judge some twenty-five or six years ago. I answered his enquiry, and he replied, "Well, this Mr. Robinson made a short but very impressive speech to me one day." I asked him what it was. "Well," he said to me, "the sentence of this Court is, that you, John Montgomery, be taken from this place, to the place from whence you came, and be detained there until a certain day, and that you be taken then to the place of execution and there be hanged by the neck until you be dead, and may the Lord have mercy on your soul."

This John Montgomery kept a hotel on Yonge Street, near Eglinton, in 1838, and was found guilty of treason in harbouring rebels, who made an attack on Toronto, during the Rebellion. His sentence was subsequently commuted to imprisonment for life, and he was imprisoned at Fort William Henry, Kingston. He and others escaped and crossed the St. Lawrence on the ice. His leg was broken in escaping over the walls, but his comrades carried him along with them. The old man concluded the conversation by remarking that it was a strange world, and that many strange things had happened in this strange world. His opinion was no doubt strengthened and he was agreeably surprised that an Act of the Ontario Legislature was afterwards passed, granting him a sum of money, in payment for his buildings, which were destroyed by the Government troops, in 1837.

During my student days there were many important criminal trials. For example, the trial of Greenwood, a servant of the Honourable John Hilliard Cameron, for the murder of Catharine Ware, with whom he had been intimate.

He was convicted on one of the charges and escaped a public execution by hanging himself in gaol. He had a prominent front tooth, extracted while in gaol. We had the trial of Brown and others for the murder of John Sheridan Hogan, a former editor of the "British Colonist," and then M.P.P. for Grey.

The murderers belonged to the "Brooks Bush Gang," the site of which bush is now all built over by the extension of Toronto, east of the Don.

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Men Who Were Their Own Lawyers.

John Thomas Cunningham, of Hamilton, who had or fancied he had, a grievance against the Honourable Isaac Buchannan, frequently appeared in Court in his own behalf. He, once, got one of his Bills in Chancery against the Honourable Isaac, noted *pro confesso*. The order was afterwards vacated, but John Thomas insisted it must be with costs against the defendant. Then the Court was troubled as to what costs John Thomas was entitled to.

The Honourable George Brown, Mr. Capreol, and a Queen's College professor, who determined that Sir John A. Macdonald should have opposition, appeared in Court frequently in election matters.

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BENCH AND BAR.

By Hon. Mr. Justice Haughton Lennox.

It can hardly be said that prior to the Act of Union in 1791 we had a settled or definite judicial system in what is now Ontario. In 1792, by an Act of the first session of our Legislature, we introduced English law. Building upon this foundation, and adopting improvements and amendments from time to time, as circumstances seemed to demand, we have developed a system of jurisprudence apparently well adapted to the conditions in a new growing country and of which we feel we have reason to be proud. Perfect it is not, of course—when can a human system be said to be perfect? —and a century and a quarter is not a long time in the history of a nation, but, for the most part, our laws affecting jurisprudence have proved effective to secure the rights, liberties and privileges of the people, and, what is equally important, the Judges without exception are, I think, firmly entrenched in the people's esteem and confidence.

As to the other branch of this great public service, the other chief officers in the administration of the law—the members of the Bar—perhaps not quite so much can yet be said. There are still a few benighted persons in the back townships and the purlieus of cities, who do not yet fully appreciate the unswerving integrity, conspicuous honesty and beneficient methods of some members of the Bar. But, speaking seriously, the great majority of the Bar enjoy and deserve to enjoy, the good-will and confidence of suitors and the public; and, as a class, there is no body of men more zealous, faithful and unselfish in the discharge of their duties in any walk of life.

I come to speak to you, however, of the relations of Bench and Bar *inter se*. It would be foolish to say that they are perfect; it would be incorrect to say that they are not fairly satisfactory; and it would be manifestly absurd to say that they cannot be improved or that improved relations will not tend to the more satisfactory and efficient administrations of justice.

Improved relations and improved conditions are to be brought about by action and reaction. What the Bench is

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must always have a potent influence on the status and conduct of the Bar; and the status of the Bar, as a body, is the most important factor in determining what the Bench will be as time goes on. The Bench is recruited from the Bar, is the product of the Bar. The Bench is the fountain of justice, but the Bar is the source of supply. A fountain cannot rise higher than its source. In the conduct of cases and in their professional relationship, the situation is peculiar. For the harmonious and satisfactory administration of justice during the hearing and argument of the case, Court and counsel are inter-dependent, but, from this point on, are separate and independent, and with duties that cannot be merged. A suggestion that in the legitimate pursuits of his client's rights, a counsel is in any sense subservient to, or dependent upon, the favour of the Court is foreign to our system and repugnant to the traditions of British and Canadian Courts. What is to be looked for and cherished in the counsel is suavity, courtesy and deference; coupled with manliness, fearlessness and firmness; but with never a suspicion of subservience or servility. What makes tyrants so readily as the sycophant and the outlaw? Crawling or cringing, on the one hand, and bluster, arrogance and insolence, and covert intimidation, in its various recognizable disguises, on the other, are alike intolerable, unpardonable and ineffective. In every thing, a counsel's conduct should be characterized by conviction, conscientiousness, directness and respectful firmness. He should state his proposition or objection clearly; he should support it by reason or authority; he should state it at once and be done with it, and win by its cogency, or fail, as the case may be. An argument is weak in proportion as it requires iteration.

We have no written code of ethics in Ontario, nothing to inspire or guide or warn the young practitioner. We have the Law Society Act for his punishment when he goes wrong. It is worth while to consider whether he might not do better in this regard. The American Bar Association and New York State Bar Association have issued "Canons of Ethics." They are said to be identical. In one of these, I read:

"It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to

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defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamour."

Fortunately for "the incumbent," it may be, and very fortunately for the administration of justice, we have no 'temporary incumbent of the judicial office" here. As to criticism, however unjust it may be, except in the rare instances in which it is calculated to prejudice efficient administration, it is better perhaps to allow it to run its course. A Judge can best be vindicated, can only in the end be vindicated, by his administration of the law of the land.

Cordial relations are of paramount importance. Should we stand upon a common plane? Yes, and no! If the "be all and end all" of the counsel's life, as evidenced by his conduct, is to heckle and abuse witnesses, pervert testimony, and by citation or argument endeavour to mislead the Court and snatch a judgment, regardless of conditions, then a common plane is not attainable or desirable.

But this is not the legitimate function of a lawyer; no duty to his client calls for it; his oath forbids it. With your oath of office, you are all familiar.

The American law requires each lawyer to swear: "I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defence, except such as I believe to be honestly debatable under the law of the land.

"I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honour, and will never seek to mislead the Judge or jury by any artifice or false statement of fact or law."

"Craft is the vice," says Edward G. Ryan, "not the spirit of the profession. Trick is professional prostitution. Falsehood is professional apostacy. The strength of a lawyer is in thorough knowledge of legal truth, in thorough devotion to legal right. Truth and integrity can do more in the profession than the subtlest and wiliest devices. The power of integrity is the rule; the power of fraud is the exception. Professional duty, faithfully and well performed, is the lawyer's glory. This is equally true of the Bench and the Bar." Of practitioners somewhat of this class, Abraham Lincoln, I think, not unjustly said: "A moral tone ought to be enforced in the profession which would drive such men out of it."

Let me say a word in all earnestness to the young men just setting out in professional life. "One false step," it

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has been said, "for ever blasts a woman's fame." "One false step, it might also be said, "may forever blast a professional career." Cogent evidence of this is found in the legal annals of every country. Lights that fail fitfully illuminate and adorn the legal highways everywhere. The most brilliantly endowed are often of the first to fall. Pitfalls closely margin the one straight way on either side. Temptations lurk at every milestone. "There are," says an eminent American authority, "pitfalls and mantraps at every step, and the mere youth at the very outset of his career needs often the prudence and self-denial as well as the moral courage which commonly belong to riper years. High moral principle is the only safe guide, the only torch to light his way."

But there is room and verge for community of effort, there is a common meeting ground, a common plane, if you will—each of you, of course, within his proper sphere—for Bench and Bar. We must, of course, level up, not level down. The duty of the Judge is clear. Speaking in this hall at a great banquet in 1862, Sir John Beverly Robinson said: "They (the Bar) would recollect—and he would remind some of the younger members of the profession—that it was the solemn oath administered to all Judges for more than five hundred years, framed in the reign of Edward III., and worded in the plain, expressive language of that time: "That he will well and lawfully serve our Lord the King and His people in the office of Justice; that he will do equal law and execution of right, to all the King's subjects, rich and poor, without having regard to any person."

The obligation of counsel is equally imperative; it is the paramount duty of every counsel who comes into a Court of justice to honestly and diligently assist Court to this end: it is not enough that he does not actively mislead, he must use his best and earnest endeavours to see to it that the Judge is not misled.

What is to be expected of a Judge?

(1) It is a condition precedent that he is rightfully a Judge. No embryo Judge who solicits the position is fit for the position.

(2) He should be professionally qualified. Once the appointment is made, there is only one way to set this question at rest: "By their works ye shall know them."

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But there is no purpose to be served by blinking the discussion; a good deal has been said about what are irreverently called "political appointments." For obvious reasons, I approach this subject with some hesitation; for obvious reasons, too, I prefer to refer to such appointments as made from the statesmen of the country, from the ranks of a great public service. But I have discussed this delicate question in the House of Commons. Do not ask me what I said; do not search the pages of Hansard; "I have wiser grown." But I must not forget the staid, austere gentlemen it is my duty to address. I have no desire, and you do not desire or expect me, to deal with the personal equation, if I may so term it, the latest lapse, if you will, of the Department of Justice. I dismiss it; but I cannot refrain from reminding you that I am in, though I very acutely realize that I am not to all intents and purposes of a goodly company—The Chief Justice of Ontario, the Chief Justice of the Exchequer Division and Mr. Justice Britton, Mr. Justice Latchford and Mr. Justice Sutherland.

And I cannot but remind you, too, of the splendid annals of the past. In the Lives of the Judges, by Mr. Read, and referring to those only who were of the Canadian Bar, quite three-fourths of our judiciary came to the Bench directly from the service of the State—a galaxy of learning, ability and integrity such as never before presided in the Courts of a new country, gentlemen, one and all, who would adorn the Bench of any country—the Honourable William Hume Blake, Chancellor Vankoughnet, Chief Justice Draper, Chief Justice McLean, Chief Justice Sir Matthew Crooks Cameron, Chief Justice The Honourable Thomas Moss, Chief Justice Sir John Beverly Robinson and others, whose names you will immediately recall.

And why? Because here, as in England, the State commandeers to her service from the ranks of the ablest and most devoted of her sons; and, as the Lord High Chancellor of England said the other day, speaking of England: "Lawyers are the leaders of public opinion in this country. . . . They have it in their hands to make or mar much of the future."

It is true of England, it is true of Canada; and we must never forget how much we are indebted to Honourable William Hume Blake and other Judges whose names I have

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mentioned, with others whose names I leave it to you to recall, for the magnificent jurisprudence of this country.

(3) Studious and painstaking a Judge should be—must be, in fact. "He that is slothful will be slothful still;" but the only complaint that I have ever heard in this connection is that some of our Judges—many of them, in fact—have worked harder than they should. The same is true of many of them to-day.

(4) Patience! Of patience, a Judge should have an inexhaustible store. He will often need it. He should be patient to sift and weigh the evidence, and to balance and distinguish decisions, and the rest of it. This is easy. He should, if he can, be patient to listen. This is not always easy. Lawyers sometimes complain that they are not allowed sufficient time. If they made better preparation, they would not require so much of it. Let the case be important or unimportant, counsel has the right to just the time necessary to get at the facts, and to discuss the relevant facts and law, in a proper way; just this much time and not a moment more. To take more time than this is to rob the public.

(5) The Judge should "keep the counsel in his place," that is at the Bar. This is not easy. It is intolerable to have two or three counsel crowding about the witness stand. It is argued that this is unavoidable at the City Hall. It is not unavoidable, but difficult. Conditions there are almost unbearable; but the very objectionable practice so noticeable at the City Hall, and in less degree in other places, goes to accentuate the difficulties arising from defective acoustics or outside disturbances.

(6) Once he is seized of the case, the Judge should endeavour to get at the truth, and the whole truth, and do complete justice; and this with or without the assistance of counsel. I do not know whether this proposition will receive the general approval of either the Bench or Bar. It is simply a statement of my duty, as a Judge, as I conceive it to be. Of course, the Court should not by any act anticipate the action of counsel, usurp his place, or take the case or defence out of his hands. Such a proceeding would be intolerable, and, in addition, in many cases lead to a miscarriage of justice. But in the end, when the counsel has done all he thinks of doing or intends to do, the inattention, oversight or failure of counsel should not deprive a litigant

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of a full and fair trial of the issues if the trial Judge can secure it.

Things to be avoided:

1. The Judge should not court popularity or notoriety. The esteem, confidence and good-will of the people generally is an entirely different matter, and to legitimately earn this will but enhance his usefulness as a Judge. The distinction is well indicated by Lord Mansfield, who said: "It has been charged against me as a crime" (and it would be a crime) "that I have courted popularity. I never did court it, but I have always studied to deserve it;" and then the learned Judge follows with some other statements not so clearly within the proper line. The proper attitude of a Judge is not open to debate. It is for him to determine the right to the best of his ability and to execute justice without hope of approval on the one hand or fear of censure on the other.

2. The Judge should not lose his temper, or his dignity, or the trend of the case, or the control of the Court or the papers in the action. You need not take this seriously to heart, as the Judges never do any of these things.

3. A Judge should not humiliate the counsel or prejudice his professional standing or financial outlook, if it can be avoided. No Judge would intentionally do this, but, provoked as we often are, we cannot be too careful that a well deserved rebuke or criticism does not have consequences outside the determination of the issues in the action.

Again of pleasant relations—cordiality and harmony between Bench and Bar. The basic conditions are mutual esteem, confidence and good-will. In promoting this the Bar is mightier than the Bench. For the counsel, frankness, honesty, industry and courtesy (not servility) is all that is needed, and will secure the esteem, confidence, ear and good-will of the Court, and, coupled with aptitude for counsel work, will ultimately win general success.

Again a word to the younger men. Assuming that you are mentally qualified to become a counsel, preparedness counts for infinitely more than anything else. Without proper preparation conspicuous ability may signally fail. General preparation, a stock equipment for every case, is the first thing. This will embrace a thorough knowledge of the Law of Evidence, of Rules of Procedure, of Nisi Prius cases, of the statutory law and of Leading Cases.

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When you have mastered this you will find yourself an envied member of a select few, and far advanced in general preparation for any case. Then comes special preparation for the case in hand, and I address myself particularly to those who do both solicitor and counsel work, as the younger men generally do. Have the earliest possible examinations for discovery, productions, perusal of productions, and admissions, where admissions are advisable. You will then know just what oral testimony you require, and you will issue and serve your subpoenas, unless there is some special reason for doing otherwise, without delay. Follow this by a careful study of the facts, until you are absolutely familiar with the issues from your own and your opponent's standpoint. Thoroughly digest and assimilate a few pertinent decisions, but do not weight yourself or the Court with *an undigested* "Digest of Cases." The result will be that you will be ready for trial when the case is called—a position not infrequently of enviable isolation.

Things to be avoided:

1. Late arrival in Court.

2. Constant objections.

3. The impromptu plan of campaign. Every step should be thought out before you come into Court. The neglect of this rule occasions infinite loss of time, and results in a lame, halting contest, and not infrequently, failure.

4. Slovenly examination in chief. This is the most difficult work in the whole range of a counsel's duties, and almost invariably the work least thought of. In a formidable percentage of cases it seems like a contest between counsel and witness as to which will be asleep first. The importance of careful preparation for this, by clearly thinking out the lines and order of examination, cannot be overestimated. David Paul Jones, one of America's greatest counsel, says: "There is often more eloquence, more mind, more knowledge of human nature displayed in examination of witnesses than in the discussion of the cause to which their testimony relates. Evidence without argument is worth more than argument without evidence. In their union they are irresistible."

Put vitality and reality into it. Learn of Sir Frank Lockwood, who says: "It should appear to be a kind of spontaneous conversation between the counsel on the one

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hand and the witness on the other—the witness telling artlessly his simple tale, and the counsel himself appalled to hear of the iniquity under which his client had suffered."

5. Cross-examination.

This is not to be taken literally. "There are times," says Mr. Wrottesley, "when indignation should be expressed, but the advocate must keep within bounds and deport himself with dignity, never forgetting the respect due to the Court from himself as one of its officers, and never forgetting the respect due to the office of advocate, which his opponent holds as well as himself." The witness is not a criminal. He is not generally a volunteer. The era of savagery, except in Europe, is gone by. Sir James Scarlett, one of England's greatest modern counsel, said of Mr. Toppling, a leader upon the same circuit: "Toppling's idea of cross-examination was putting over again every question asked in chief in a very angry tone"; a method not unknown in Canadian Courts. This is *cross*-examination of a kind. Baron Alderson once said of a counsel whose name is charitably withheld: "Mr. ——, you seem to think that the art of cross-examination is to examine *crossly*."

6. Avoid bad temper. To lose your temper is to lose your grasp; it may be to lose your case; it ought to be to lose your client.

7. Avoid uniformity, or give up counsel work. A lawyer who has only one method of examining witnesses may be a good lawyer but he will never be a successful counsel.

8. Avoid collateral discussion. In a Court of Justice there are only two, or at most three, forums to be addressed —the witness, the Judge and the jury.

9. Avoid personal or quasi-personal actions. The man who conducts his own case "has a fool for a client," and none the less because he happens to be a lawyer. The same for relatives and close connections; in fact it applies to any action in which the affections or interests of counsel are likely to be warmly enlisted.

And now, Mr. President and gentlemen of the Ontario Bar Association, in thanking you for this opportunity of coming in close touch with so many eminent Canadian jurists, and your guests of the American Bar, and in wishing you all individually and as an Association a very Happy New Year, and abiding and unbounded success, I very earnestly express the hope and belief that throughout the

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year, and in all the coming years our existing kindly, cordial and harmonious relations will ever deepen, strengthen and increase; and that unitedly animated by lofty aspirations and worthy aims we may in some measure be instrumental in averting anything that could sully, and in perpetuating in this part of his Majesty's' dominions the splendid traditions of the British and British Canadian Bench and Bar.

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ONTARIO BAR ASSOCIATION.

SPEECH BY SIR GEORGE GIBBONS.

Mr. President and gentlemen:

I am not down for an address; the program, as you will see, says "Words." I am merely here to give me an opportunity to express my gratitude to this Association for conferring upon me the honour of Honorary President for the balance of the term owing to the vacancy which occurred through the lamented death of your late Honorary President Mr. Bicknell. As we all know, Mr. Bicknell was a man of a very large practice, but he took time also to take a great deal of interest in this Association, and was also the Chairman of one of the most important committees in Convocation, and was in all his efforts on behalf of the profession noted not only for his ability but for his zeal. It comes to few of us to accomplish so much as did Mr. Bicknell, not only in hard work which he devoted to the service of his clients, but also the time he was able to give to the general welfare of the profession. I have not taken heretofore a large interest in the work of this Association, but I will try in a humble way during the coming year, and as long as spared, to devote more energy, and I hope some service to the good cause.

These are sad times, and a great deal has been said by your President naturally in his address about this time of war. I am glad to find that you have on the platform a member of the American Bar Association, and that at your banquet to-night prominent representatives of the American Bar are to be there. It is of good comfort, I think in this our day of trouble, when the hearts of everybody are in the trenches at the front, to feel that our neighbours are so strongly in sympathy with us, because notwithstanding the nominal neutrality I think the real condition is a good deal as pictured by "Punch" of the American in London being asked what his attitude was with regard to the war. He says, "I am for neutrality, absolute neutrality, in fact I don't care which of the allies lick the Germans." I think that is largely their spirit, and it is well for us, and well for the world, because they are largely the judge that must give the verdict of public opinion in the civilized world as to what is decent between the nations, and they have by almost

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unanimous verdict decreed that Germany is wrong, that Germany has not kept to the law, and she has broken the faith; and to my mind if there was no other reason for knowing that we must be victorious in the end it is the fact that condemnation has come; the voice of the civilized world and of right and of justice is not dead; it will speak, and it will be heard, and is being heard by Germany to-day, is having its effect upon her and upon her people, and will be one of the causes, in my mind, that will work towards the shortening of this dreadful war. I am not going to make a speech, this is no time to talk of peace; it is for us to assist those who who are at the front. Many of our profession are going to the front. As in the American War, you will find that the lawyers are the men who, in the volunteer army, above all others, will have the confidence of the people, will be the leaders of men. Both the Northern and Confederate armies were made up and largely officered by lawyers who, almost to a man in the South, and very largely in the North, enlisted in that way; and so now ours are going to the front; you have heard so in the President's address. We have Colonel Wigle of Windsor, we have Colonel Logie of Hamilton, a Bencher of the Law Society, going to the front with the second contingent; and others are drilling, others are preparing, others will go. But after the war is over, perhaps while it is going on, I would hope that this Association might take some part in that great organization, the Society for the Settlement of International Disputes by a judicial forum, that this Association shall appoint representatives. Only one Canadian that I know has taken any great interest in those meetings, and that is Mr. Justice Riddell, but I think others of our Judges and others of our prominent members of the Bar ought to join with leading lawyers of the United States, men like Root, Taft, Roosevelt, men who are seeking to find some remedy so that after this war is over there will not be chaos and disorder, but there will be among the nations a Court so that there will be government of the nations by the nations through a constituted Court. Many people think that this is merely a dream, that it is hopeless to think that anything excepting force and might is to decide the issues of this world. If I thought so I would be very disheartened as to the future, as to what would come to our children who live after us; but I do believe that the time has now come when the advance of civilization has reached a

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point that the decent people of the world can get together, and after this war is over and after the issues have been fought out, try and provide some remedy other than force to settle the issues between the nations. I thank you very kindly for listening to these disjointed remarks.

SPEECH BY HON. MR. JUSTICE BISSELL.

On behalf of the Lawyers' Club of Buffalo, N.Y.

Mr. President and gentlemen of the Ontario Bar Association:

The President of the Lawyers' Club of Buffalo, knowing that I had accepted an invitation to your meeting here and that I had been asked to represent the New York State Bar Association, asked me while I was in Toronto to convey to the officers and members of the Ontario Bar Association an invitation to a banquet which that organization proposes to have at a time that will be convenient for you, and he wishes the invitation to go to as many members of the Ontario Bar Association as will be able to come. This organization, the Lawyers' Club of Buffalo, is an organization officered and stimulated by the work of young men, the younger members of the Bar; they have been quite active at our Bar in Buffalo for some time. Some of your members have visited us; I know Mr. Hearn has been over to visit us, and Mr. Ludwig came over a year or two ago when these lawyers gave a banquet in honour of two recently elected Judges, and we listened to a very eloquent address by Mr. Ludwig, who quoted largely from Lord Bacon in giving advice to the Judges who were then banqueted, and I assure him, if he is here, that the address made a very deep impression on the mind of at least one of those Judges. These younger members are able through their activities at times to secure the attendance at their banquets of some of the great men of the country, and in that way they have drawn the older members of the profession there into the position of supporting them very heartily; and I was asked when I was here to say to you that they were going to extend this invitation, and that they hoped that you would accept it, as many of you as possible, for this general banquet which they

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wish to give in honour of the members of the Ontario Bar Association.

Now, in going from you, gentlemen, I wish to assure you that I have enjoyed the interchange of courtesies here very much indeed; I have enjoyed meeting your officers, your excellent President, and also my brethren of the Bench, and I have enjoyed meeting all of you. We have a way in Buffalo and in our judicial district of fraternizing with the lawyers just as you do here, and it has been a very great pleasure for me to come here. I think these interchanges develop and help us all, and I hope that when the time comes you will accept the invitation of these younger members of the Buffalo Bar and come over in large force. I thank you for the kind reception you have given me here to-day, and for all the courtesies that have been extended to me. I say good-bye to you.

Speech By William Short, Esq.

Of the Alberta Bar.

Mr. President and gentlemen:

You all, of course, recognize the fact of the difficulty that stares a man in the face the morning after the night before, and none more than I at the present time; yet on behalf of the Bar of Alberta I beg to bring you their heartiest greetings and their best wishes for a bountiful year; and I do so with the more pleasure in that there are so many members of the Ontario Bar now practising in our province. They say that the same problem confronts all members of our profession. It seems to me, however, that that is not altogether the case. In our province we have a sort of melting pot of nationalities; all people and all languages are there represented, and it is to us to reduce to the common standard, the standard of British nationality, those who have come to us from countries of Europe where they escaped from tyranny; that left them little better than slaves; and it is, therefore, to us, to mould from them a people that shall create a nationality in Canada, as great as that for which we aspire. Here in this province you have no such difficulty. For the greater part you have people who have long been accustomed to the duties of self-government. We have

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to educate a great majority of our people in the first principles of that steadiness of character which makes for ability to govern, and when one realizes the task that the Empire has now set itself; when one realizes that the mother country has gone out into a war with a nation that is a nation of soldiers, her sons have gone to throw away their lives; when one realizes that the mother country is composed of men whose sensibility of body and of mind and of spirit is at least as great as any in the world, and that these go out knowing that they are going to pour out their lives as water is poured out of our great rivers, when we realize the Spartan sternness of character that makes that an easy gift, and then when we come to our own country, and realize what we have to do to live up to that high standard, and that we in our country have so far to travel in that direction, it does seem to me we will understand that our task is passing that which you have to achieve. I am one of those, Mr. Chairman, who believes that the greatest of all professions is that in which we are engaged, that upon the standard which we set to a large extent will depend the character and the result of the nation that is to be; and if we fail then great indeed will be the loss to humanity; and in this city and under the conditions in which we find ourselves; when there is in this continent at least, so great a wave of what has been euphemistically called crude emotionalism, then I think you will agree with me that our task is harder still. A sort of self pity seems to pervade us that finds it difficult to stand up against the stern things of life, we are too ready to fall down, and too ready to adopt that which is paternal, to think that the State owes us a living, to think that we ought not to bear the results of our conduct, that we ought still to have our cake and eat it. Mr. President, it does seem to me that on the Bar of this Province, on the Bar of our own Province in a still greater degree, rests the growth of character that is peculiar to man's estate, and the kind of men that make a great nation, and the only kind of men that can continue to exist in the ranks of the first nations of the world. I believe, Mr. President, that we shall acquit ourselves honourably, and it has been an unprecedented pleasure to me to meet so many and so diverse a representation of the greatest of all the professions; I profoundly thank you for the liberty, and for the pleasant associations that you have given me.

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Speeches at Banquet.

The Ontario Bar Association held its Annual Banquet at the King Edward Hotel, January 6th, 1915, at 7.45 p.m., the President, F. M. Field, K.C., of Cobourg, presiding.

The guests at the head table at the annual banquet, and in the order of their seats, were as follows:—The Lieutenant-Governor's Aide, Mr. C. A. C. Jennings (of *The Mail*), E. F. Surveyer, K.C. (Montreal), Judge Ward (Port Hope), Justice Maclaren, Frederick A. Fenning (Washington, D.C.) Attorney-General Lucas, Mr. Eugene Lafleur, K.C. (Montreal), Rev. Prof. Law, His Hon. the Lieutenant-Governor Hendrie, the President, F. M. Field, K.C., Justice Britton, Justice Bissell (Buffalo), Hon. W. H. Hearst, K.C., Frank T. Lodge (Detroit), Justice Lennox, Wm. Short, K.C. (Edmonton), Justice Kelly, Judge Huycke (Cobourg), Mr. Donald McIntyre, K.C., Dr. Macdonald (*The Globe.*)

President: We are to have a number of very entertaining speeches. We have a great many distinguished guests. You will observe by the program that we have not in any way hampered any of them by assigning any of them to any particular toasts. We have but two toasts on the program and I will ask you to fill your glasses and drink to the King.

Toast to the King.

The President: It is a matter of very great congratulation to all of us, and a matter of keen appreciation by the Ontario Bar Association, that on this occasion we are honoured by his Majesty's representative for the Province of Ontario. We appreciate keenly the fact that the Honourable Lieut.-Col. Hendrie, Lieutenant-Governor of Ontario, is with us to-night, and I am sure if in the course of his duties it is incumbent upon him to make reports to the head of the great Empire, of which we are a part, he will be pleased to report how the toast has been drunk on this occasion. There is one other toast, and I shall ask you once more to fill your glasses and drink to those who are nearest and dearest to us —our soldiers and our sailors.

Toast: "Our Soldiers and Our Sailors."

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Singing: "Rule Britannia," and "Soldiers of the King."

THE PRESIDENT: I see upon the program of speakers is the name of the retiring President of the Ontario Bar Association. An all-wise Providence has so effected my larynx on this occasion that it is impossible for me to inflict upon you the speech that I intended to attempt to deliver, and I am sure that all of you bow to the decrees of Providence.

Before proceeding with the rest of the program I desire to intimate that we are disappointed with regard to some of the speakers who are announced upon the program, but while that is so, I am very pleased to state that those gentlemen of the Bench and the Bar who have taken the places of those who unfortunately cannot be with us, will, I am sure, do justice to this occasion. I have to express the regrets in the first place of Honourable Sir Glenholme Falconbridge, Chief Justice of the King's Bench; I have to express the very keen regret of the Honourable Sir Charles Davidson, Chief Justice of Montreal; I have to express regret of D. W. Amram of the University of Pennsylvania, who intended to be with us and address us to-night, but who has kindly sent up his very interesting paper on Bankruptcy Law, to be read to us to-morrow. I have also to express the regret of Sir James Aikins of Winnipeg, President of the Canadian Bar Association; also the regrets of Mr. W. J. McWhinney, First Vice-President of this Association, who is with us in thought though not in person, for he cabled to us from Belfast to-day. I have also to express the regret of Mr. Creswicke of Barrie, the Second Vice-President of our Association, who cannot be with us; and of Mr. J. S. Campbell of St. Catharines, a member of our Council. I think I have dealt now with all of the regrets. And before calling upon the first speaker, His Lordship Honourable Mr. Justice Britton, who has very kindly, at scarcely more than a moment's notice, consented to take the place of Sir Glenholme Falconbridge on this occasion, I desire to say that in addition to being honoured by the presence of the Lieutenant-Governor, His Majesty's representative, we are greatly honored in having with us the Rev. Prof. Law, and in addition to the Judges of our own Supreme Court and County Court, we are greatly honoured in having the Honourable Mr. Justice Bissell of the Supreme Court of the State of New York, Hon. Mr. Frank T. Lodge of the Michigan Bar, and Hon. Frederick

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A. Fenning of the Washington Bar. In a spirit of fraternity these gentlemen have come at considerable personal inconvenience and over many miles to be with us and extend greetings from the various Bar associations that they represent. We have also with us Mr. Eugene Lafleur, our compatriot from the neighbouring Province of Quebec, who entertained and instructed us on the subject of International Law, as applicable to the present war, this afternoon. We are to hear from His Honour Judge Huycke of Peterborough, as representing the County Court Bar, before which in the discharge of our duties we are haled a good deal oftener than we are before His Lordship's Court. There are other gentlemen here whom we shall be pleased to hear if time will permit. We are greatly honoured on this occasion, I think the only occasion in the eight years of our history, in having with us at this time the Prime Minister. Knowing probably that he was to meet here the leader of the Opposition in the person of Mr. Rowell, he has brought with him his Attorney-General, and I am sure we all hope that as the evening goes on we shall have an opportunity of hearing from all of them.

Without detaining you further I will ask you to listen to the veteran of the Bench, Honourable Mr. Justice Britton. He told me just a moment ago that his reminiscences of student days went far beyond those of Col. Farewell's this afternoon, and if he were not so young an old man I would be tempted to quote at him the lines of Oliver Wendell Holmes, speaking of a veteran:

> "They say that in his prime
> Not a better man was found:
> They say that in his prime
> E'er the pruning knife of time cut him down"—
> (which it has not)—
> "Not a better man was found
> By the crier on his round through the town."

You will judge in a moment or two, when I give him an opportunity, that the pruning knife of time has not cut him down. I have very much pleasure in introducing His Lordship Mr. Justice Britton.

HONOURABLE MR. JUSTICE BRITTON: Your Honour, Mr. President, and Gentlemen of the Bar Association of the Province of Ontario:—The reception accorded to me is so very cordial that it is almost embarrassing, but I accept it in my representative capacity. It will be noticed that I am here

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as the regret of Sir Glenholme Falconbridge, the honoured Chief Justice of the former King's Bench Division. No one regrets more than myself the absence of my chief, for he has the faculty of happy expression, so that he can and would, if here, say in a few words what would require rambling sentences from me. Whether in his judicial work or at a banquet Sir Glenholme's remarks are to the point.

I know you will bear with me as his representative. The members of the Bar are kind and considerate, willing to overlook faults, unless too glaring. I have to thank you for myself and on behalf of the guests to-night for your very kind invitation to us to be present at this splendid banquet. Of course all will understand that I do not assume to speak for any guest who will speak for himself. I thank you most heartily for the opportunity of meeting you again at your annual banquet. This one seems to me to so far excel any that I have had the privilege of attending before that I must think there has been progress at all events in this one direction in the matters of your Association. You Mr. President, I think are to be congratulated on the work of the year that has passed: I congratulate you on the success which is evident by the large attendance and the enthusiasm and spirit manifested in the proceedings of this evening. When I looked over what was done this afternoon I did say I could go back a little farther than Col. Farewell did in his reminiscences; he spoke of the early sixties; I could tell you a little about the late fifty-nine's. You know the name, I am quite sure, of a Mr. Gwynne, who was connected with the Law Society, and you know the name of Mr. Malloy, and I can tell you as a matter of reminiscence that I do not think anybody could give a reason better than Malloy could of why that crook on the back of the stuff gown you all wore, and that we have had not only in student days, but others, could give a reason for that appearing on the shoulders of the barristers in the stuff that they wear. I see that somebody seems to think he knows something about it, because if I am correctly informed in reference to that nice, loyal association which has been formed in Osgoode Hall as either a Home Guard, as the ready persons for the next contingent, or whatever service it may be, in defence of our country, or in defence of the land we have come from, I say whoever has

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given them the name of the Devil's Own probably had reference to the crotch on the back of this stuff gown. I am not going to reminiscence further than in those student days there were places that were looked upon where a good deal of sharp practice prevailed, and that were looking out for costs or little side motions, of which you never hear. I came in with the Common Law Procedure Act—and you may never have heard of that—and I am going out with the Judicature Act.

The first work I was put to as a student in the late '59's was in connection with ruling the sheriff. You never hear of such a thing as ruling the sheriff; but the sheriff at Belleville had a tremendously long name, and I thought in my simplicity as a student that no man ought to have so long a name as his name, John Wedderburn Dunbar Moody, and in filling out the papers I put John Wedderburn as one name, and Dunbar Moody as the other, and the consequence was that my first experience was to pay the lawyer's costs for the mistake in ruling the sheriff. So technical was it then; nothing that we hear of is so technical as that, but it is broad principles that we try to remember and enforce in reference to matters that come before us.

As to this gathering that we have and so pleasant a gathering as it is, I am sure that no one can be more delighted than I am to have here these gentlemen from the great country alongside of us, where we all would rather live than to live in any other place except in Canada; sitting here we do not think the United States is so enviable a place, but we like to have people from there coming over, and I congratulate the Association in having them here on this auspicious occasion. They have come to a big country; we have everything under the sun to make a country great, and they come here to-night and they see the Premier of the Province, they see the Lieutenant-Governor of the Province, what more can they ask for? I do not propose to boast about our country, but I do appreciate it to the full, and they have come now, when everyone is most deeply interested, when we have this great war on our hands, and when every one feels so enthusiastic in anything that would tend to help the soldiers to do what we cannot do ourselves; because some of us, as well as myself, are beyond the age limit, and cannot go to the front and dig in the trenches, but all

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we can do the people in this country are willing to do in defence of the country from which we come, and in defence of our own country; and as I say, I do not want to blow about it, but it reminds me of something I heard the other day on the car. Perhaps you have heard it: if it is an old joke, why it comes from an old man, so that I suppose is all right and proper, and if it is a new joke then you can have it for what it is worth:

A salesman from Chicago was boasting of that great city and it is a wonderful city, the most wonderful city in the world for its age, no doubt about that; he was boasting of Chicago, and the other man was boasting of Winnipeg. He said Winnipeg was bound to be the centre of everything that was good in this whole Dominion, and before very long too, it was rapidly catching up to Chicago, and would soon be the midway city between the two oceans. This rather silenced the other man; the Winnipeg man said the only thing about it was Winnipeg had not a lake, every city to be anything ought to have some lake or river, or be on some lake or river, and that was the drawback to Winnipeg. The Chicago man then said: "You have Lake Superior." "Yes, but Lake Superior is 500 miles away." "Oh, that does not make any matter," said the Chicago man, "you could pipe it." "What do you mean by that?" "I mean just what I say: begin with Lake Superior and lay the pipes down to Winnipeg." "What then?" "Then, if you can suck as hard as you can blow you will have the lake there next morning." That is going farther than I hope to go in connection with our country, but I do feel that we have all that will make a country great.

As to the progress of the Ontario Bar Association it is so manifest that I cannot stop without expressing my gratification that under your regime this success has been attained; it is not without labour on your part, and it is not without labour on the part of your helpers in the Association.

I am glad the County Judges are here. The County Judges are just waking up to the fact that they are going to have something to do. We have fifty odd counties and districts in the Province of Ontario; a great many of these counties had two Judges, but for a long time they had not enough for one to do, and so the Government appointed another to help them; but now they have a great deal to do, and with the present status the lawyer has more to do with

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them than with the Superior Court Judges and I may say for the benefit of our neighbours in connection with the administration of justice here, a great many changes have been made, and these seem to me to have alleviated the work of the High Court Judges, and to load more work on the County Court Judges, and also more work upon the Appellate Division. What has been the result of legislation in regard to these matters? In the first place they took away from the trial Judge all things in connection with drainage work, and they appointed a Drainage Referee to look after it. Then they took away the work in reference to mines, and they have a Mining Commissioner; then they took away some work in connection with municipalities and they have a Municipal Board, and I have great pleasure in testifying after a long acquaintance with the Chairman of the Municipal Board, to his ability and to his fitness in every respect, not only for that, but for any office he may have. Mr. MacIntyre and I are old friends, and not always old friends either, sometimes he did not like me very well, and sometimes I do not think I liked him, but I have gotten over all that and I appreciate him to the full. They have also taken away the work that we used to have under the Workmen's Compensation for Injuries Act. These things are taken away from the trial Judge, but they are loaded on the Appellate Division, so that they are going to have a great deal of work; they will be able for it I have no doubt, and everything will run smoothly. I am looking for a playing spell and some of the other Judges will have as much and as good a time in playing as I will have in reference to it. These are the changes which have taken place in the administration of the law. These changes make a very great difference to persons in Osgoode Hall, and the Bar Association now will have to deal more with the County Court Judges and with the Appellate Division than they will have to do with me, and those that hold positions similar to mine. I thank you very much for having heard that much of what I say, and having congratulated you for your success I congratulate myself on having finished, and therefore will sit down.

THE PRESIDENT: His Lordship told us an exceedingly good story about the Winnipeg man and the Chicago man, but that Chicago man ought to have heard the man from Edmonton, and I am very glad that we have Mr. William Short

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of the Alberta Bar, all the way from Edmonton, who will doubtless speak to us during the evening. In the meantime however, we must give some other nation a show, and we will now hear from the Honourable Mr. Justice Herbert Bissell.

The American National Anthem was sung.

HONOURABLE MR. JUSTICE BISSELL: Mr. President, distinguished guests, members of the Ontario Bar Association:

The invitation extended to me to attend this banquet here to-night was, I assure you, accepted with grateful alacrity, for two reasons: first, because the members of the New York State Bar Association which I have the honour to represent here to-night, cherish very pleasant memories indeed of the dignity of presence and the eloquence of speech of the distinguished representatives of the Canadian Bench and Bar who have spoken at the banquets of the New York State Bar Association, and also at the banquets of the Lawyers' Club in Buffalo; and secondly, because I wish to express our sympathetic endorsement of the views of Lord Haldane, who declared, as you remember at the meeting of the American Bar Association held in 1913 at Montreal, that the United States and Canada and Great Britain together formed a group which is unique, unique because of its common inheritance in traditions, in surroundings and in ideals; and nowhere, he said, is this common inheritance more apparent than in the region of jurisprudence. The lawyers of the three countries think for the most part alike; and we of the New York Bar stand ready to respond to the desire expressed by the Lord High Chancellor that the lawyers of these three countries would steadily direct our thoughts to how we can draw into closer harmony the nations of a race in which all of us have a common pride. We are bound together by the fraternal ties of the common law, and the lawyers of Canada and the lawyers of the United States just at the present time, have every reason to exchange greetings of mutual good will and of an enlightened fraternal sentiment. Within the past fortnight we have commemorated the anniversary of the signing of the Treaty of Ghent, which marked the beginning of a century of peace between the English-speaking peoples of the old and of the new world. We are united in viewing with pride and satisfaction the various achieve-

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ments of the Anglo-Saxon race in advancing civilization and in securing human liberty; we rejoice, all of us, I am sure, over the beneficent accomplishments of our common ancestors in forcing the Magna Charta from King John and equal rights from King George III. The time has long since gone, when reminiscences of the days when though brethren we strove together, should longer rankle in the mind. We rejoice in common ancestors, and I believe the time has come when we shall no longer hesitate to join in paying homage to the high purposes of those brave and resolute colonists who made that immortal declaration of truths eternal, which asserted that all men, kings and peasants, master and servant, rich and poor, were born equal with equal rights. —(hear, hear)—and inheritors of equal claims to protection before the law, and that Governments derived their just powers, not from conquest or from force—and you are having a lesson of that now—they derive their just powers not from conquest nor from force, but from the consent of the Government, and they exist only for their protection, and to make them happy. Now, the people of Canada, equally with the people of the United States, have enjoyed, as you will know, the benefits of this grand declaration of our liberty-loving ancestors, and to-day we meet, whenever we do meet, as kinsmen and well-wishers, stimulated by reciprocal sentiments of good-will, proud of the achievements of the Anglo-Saxon race the world over, and to-night at this time we have a special reason to be proud that with an international boundary extending nearly 4,000 miles across this American continent we have lived as neighbours, preserving a happy and continuous peace for 100 years without the menace of fortifications, and without the rattling of the sabre or the shaking of the mailed fist, and standing ever ready to aid one another in accomplishing what was best for mankind, and what would bring to you material prosperity and individual happiness, as well as what would bring them to ourselves.

Now, we lawyers I think from both sides of the imaginary boundary line, the governmental boundary line, imbued as we are with the high sense of justice, of mutually reverencing the common law, have just cause to feel proud of our part in maintaining this century of peace. While the lawyer has always been foremost in every struggle for religious and civil liberty, it has been truly and wisely said that "law

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is the mother of peace, the very least feeling her care and the strongest not exempt from her power." The common law is a grand inheritance from our English ancestors, and in this respect as in others, America is the heir of all the ages. In the words of Ralph Waldo Emerson: "The language of the common law, impressive forms of Courts, the precise and substantial distinctions of the law, are the contribution of all of the sharp-sighted and strong-minded men who have lived in those countries where the common law governs."

Now, in the days through which we are passing, and in view of our devotion to the common law, and in view of the remarks of Lord Haldane, it seems to me that one great humane mission, still to be accomplished by the legal profession of Great Britain and America, in the interests of righteousness and permanent peace, is the establishment on a firm basis of an International Court for the settlement of all future International disputes. (Applause.) But, gentlemen, while we lawyers are generally pretty well satisfied with the part that we have borne in the extension of civilization and in the promotion of the faithful pursuits of mankind, and while we know that our highest aim has always been to maintain the security of life, property and domestic happiness, I think you will agree with me, like the martyrs of old, we have frequently been subjected to much hard treatment and misrepresentation. It seems as if our profession especially has been made the favorite target for the shafts of the wits and satirists of all ages. We have been accused of being the fomentors of strife, grinding the faces of the poor, of being mere sophists, of disregarding the truth and of dwelling especially upon the quips and quirks and the trifles of life. Why, did not even a former distinguished Lord High Chancellor of England, Lord Brougham, define the lawyer as a learned gentleman who rescues your estates from your enemies and keeps them unto himself; and is not that old, old story relished by the unappreciative. You have heard of the two Irishmen who were standing before the tombstone in the Tipperary churchyard, and reading the inscription: "Here lies a lawyer and an honest man," when Pat turned to his companion and said: "Be jabers, there must be two of them in this grave." Have we not learned to meekly submit to the popular classification which puts the clerical profession first in all works of morality, and beneficence, the medical profession second, and our own last, and

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away down last, if indeed a benighted popular prejudice will allow us any connection with works of morality and beneficence at all. But, gentlemen, in spite of all of the evil that has been so freely ascribed to us, in spite of the quips and jests and satire to which we have ever been obliged to submit, I insist that in none of the other professions does there exist such a kindly feeling of one member for another, such a generous disposition to extend brotherly assistance, and such absolute freedom from jealousies and discords as exist in the noble profession to which we belong. We know no sects, no heresies and no schisms, we engage in no conflicts between allopaths, homeopaths, osteopaths or quacks; our mistakes are not buried with the victims; on the contrary they are always exposed to public view, and are reviewed and corrected by our brethren of the Appellate Court, and when the final decision is reached we hasten to congratulate the winner. One of our poets on our side of the line, Judge Robert Grant of Boston, has thus expressed the sentiment prevailing among devotees of the common law:

"No quarrels have we of our own,
We manage others' broils;
And though we fight with all our might
We've buttons on our foils;
We scratch a brother lawyer's eyes
Until they are out,
And then we go to dine with him that night
And scratch them in again."

It seems to me, gentlemen, the English common law may be based upon this strong fraternal sentiment; and is it not further shewn in the spirit of confidence with which we of the Bench adopt wisdom evidenced by the decisions of our judicial brethren of other times and other places? Yes, Mr. Toastmaster, I wish to assert here to-night that the legal profession is one grand rare brotherhood, believing in the same standards of truth and justice, leaving our professional differences in the forums where we have contended, striving to adjust as well as we can, the contentions which will arise amongst that vast majority of mortals whose chief object in life may be the cultivation of virtue, but which will still keep on sinning and quarrelling and overreaching. I believe that Lord Haldane's theme so well treated at Montreal has struck a response and a sympathetic chord among all the lawyers of this American continent, and we are ready to join with our English brethren in drawing into closest

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harmony the nations of a race in which all of us have a common pride.

Now, gentlemen, I am very glad that I came here to-night, and I wish to say that the very pleasantest hours I have known on my journey thus far through life have been passed in the company of lawyers. This gathering here of Canadian jurists, to which you have so graciously invited representatives from the United States, will be cherished and remembered by me as one of the very happiest of those occasions.

Solo: By Frank Oldfield.

THE PRESIDENT: I have now great pleasure in calling upon Mr. Eugene Lafleur, K.C., of Montreal, to address us.

MR. EUGENE LAFLEUR, K.C.: Mr. President and gentlemen of the Ontario Bar Association:

To the long list of regrets through which you have unfortunately been going to-night, I must, perforce, add another, the Batonnier of our Bar has found it absolutely impossible to be present at your festivities this year, and to thank you in person for the very cordial welcome which you have given to your guests from Quebec. However, he has sent a worthy representative in the person of my friend, Mr. Surveyer, who is charged with the pleasant duty of expressing on his behalf his appreciation of your bountiful hospitality, and of telling you how much we all enjoy the privilege of being with you to-night. However, as you have sent me, not so much in my representative capacity, but personally, an invitation to be present at this banquet to-night, it gives me an especial pleasure to have been afforded this opportunity of meeting the members of the Ontario Bar with whom I have had constant relations, both professional and social, for more than a quarter of a century. It has been my privilege to come in contact with almost every one of your great leaders, both in the past and in the present generation, not merely crossing swords with them in our Federal and Imperial Courts, but also in a great many cases forming very close and valued friendships. I can recall among others some names that are very familiar to you: that sturdy father of nisi prius, James Bethune; the massive intellect and the compelling advocacy of Edward Blake,

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the scholarly, refined and persuasive eloquence of Christopher Robinson, and above all the unequalled charm of his personality; the profound knowledge of human nature and the common sense, amounting almost to genius, of Britton Osler; the dashing, the versatile and the resourceful Dalton McCarthy; and last but not least your great Nestor of the Bar, Sir Æmilius Irving, the perfect type of a gentleman of the old school. This is indeed a galaxy of talent of which not Ontario alone but all Canada is justly proud. Among the living I shall mention no names, but I may be permitted to say this much, that whether the fortune of war has placed me on the same or on the opposite side, I have always found not merely loyal allies and valiant foemen, but also and principally warm friendship and good company; and so looking around this board at so many friendly faces I am made to realize more and more the strength of the tie which binds us lawyers together throughout the world. Just as the science of jurisprudence has no territorial limits, so also its votaries can ever meet on common ground; our differences are not fundamental, because of the universality of the principles of the law; our aims are identical, though our methods may be diverse; but what shall I say of the closer and the holier bond that unites us now in this hour of supreme peril? Many are the members of our profession who are forsaking, or about to forsake, the arena of forensic strife to take their part in the terrible litigation of nations which is going on in Europe. Our men will meet your men on the battlefields as comrades in arms, and they will add one more example of the marvellous unity of the great Empire in the time of stress, and although they will be armed with weapons very different from those which they are wont to use in their forensic contests, they will be defending the same cause, they will be fighting the same fight, to make justice prevail—and, gentlemen, it shall prevail.

THE PRESIDENT: I have very great pleasure in calling upon Honourable Frank T. Lodge of the Michigan Bar to address us.

Chorus: "We don't give a damn for the State of Michigan."

HONOURABLE FRANK T. LODGE: Mr. Toastmaster and my friends on this side of the table, and my friends I hope, musical and otherwise:

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This is the first time in my experience that I have ever been introduced as a speaker in music and in verse. Inasmuch as in our country we are bottling up the water power and considering dams pretty valuable things, and inasmuch as all that power goes to waste without a dam, I was wondering what our friends at that table would be if they were bottled up instead of unbottled. However, with regard to the musical introduction, I feel very much like the Methodist, I do not think it was an Anglican Church, minister, who was once presented by one of his lady parishioners with some brandied peaches, and wrote saying that he did not care much for the peaches, but he appreciated the spirit in which they were sent. And while we are on that line it just reminds me of the condition my brain is in at this particular time, trying to get my wind; I am reminded of a levy which in my younger days I once had made by some constables wherein they levied upon some household furniture. It belonged to a good liver, and in our State—I presume you have to do the same thing here—our constables on making a levy have to make an inventory and the constable who acted as clerk of that inventory wrote a very fine hand; and I missed him sometime afterwards; he had not reported; so we had to go down and see what had become of our constable. Not knowing whether this gentleman, the execution debtor, who was well known as a desperate character when he was excited, had gobbled him or done bodily violence to him or otherwise, we went down there, and we found that the lord of the house was not at home, but the constables were very much at home. We found them both on the floor of the dining room; the inventory was grasped in the left hand of one of them who was the clerk, and we found in the other hand of one and in each hand of the other a whiskey bottle empty; the spirit had gone and we saw this inventory in a very fine hand, regular and straight, with no traces of emotion or nervousness. The levy began: "One set of parlor furniture, one set of dining room furniture, consisting of six chairs, one table, one dining room table, one buffet" —and then the writing began to wiggle a little bit—"and three bottles of whiskey," and then it was very difficult for us to make out the last item, which was "one revolving carpet." That is a very fair picture of my brain at this particular time, especially in view of the musical introduction I received in rising to my feet.

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Did you know, my friends, just 101 years ago to-day occurred the Battle of New Orleans, which was the last time that men of the United States and men of Britain crossed swords. We had declared peace before, but the news had not got to this country; and to-night in this presence my friends I am glad to shake hands with you figuratively, at least, as we celebrate in peace and amity and loving kindness the one-hundred-and-first year of peace and brotherly love, national and international, between you and us. Why, look at this collection of gentlemen; they do not look any different from us. I did not notice when I came into Canada—there was just one thing that made me conscious of the fact—and that dastardly act was done on the other side—that was when your officers were permitted to examine my luggage to see if I was introducing any contraband copper or anything of that kind into your country; I noticed as I walked along the street to-day that your women seemed to look just as good to me (Oh, oh!); I have noticed as yet no patois to mark that you and I speak a different language, because we are sectionally divided. I had to pierce no Chinese wall when I came in here, and the examination of the Customs officers and of the immigration officers was a matter of form, as they very gentlemanly and courteously informed me. Why, my friends, what is the difference between you and me, so far as country is concerned? You cannot lay your hand on the boundary line that divides us. It rather hurt my feelings when the President of your Bar Association this afternoon, in introducing that elegant and cultured little gentleman from Montreal, whose address so delighted us, Mr. Lafleur, in speaking and attempting to put a limit on the land where his fame was known, said from the North Pole to the line that separates from the United States. Why, my dear sir and brother, that line unites us together. We are side by side, and the blood that runs in my viens as well as the blood that runs in your veins is red English blood; I am the descendant of an Englishman, and I have just enough Irish in my veins, mixed up with it, to like to sing Tipperary every time you strike it. And so, you and I, my friends, are here, not as representatives of different countries, except as your Customs officer told me, as a matter of form; you and I are the children of the same common law, and the principles of freedom which have given me the opportunity to come here

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and meet you cultured gentlemen; and the public school and the public churches, and the other humanizing and civilizing influences which one man has set up for the benefit of the education of another man, belongs to you and me together; the principles of liberty are the same in the Constitution of Canada as they are in the Constitution of the United States; and, my friends, even the song of your country, which, whenever it is sounded at any public gathering, calls you to your feet, thrills with the same sweet melody, which on the other side of the Detroit River calls a patriotic American audience to its feet, the only thing is the words are just a trifle different, because of the different form of government, but the same sweet note of patriotism and the same high note of allegiance to the same lofty ideals thrills your hearts and mine together.

In this presence, my friends, I am not unmindful of the fact that my first introduction to a Toronto audience was in 1898 in the Foresters' Temple, when I was Deputy Grand Master of the Grand Lodge of Michigan, and was by the Grand Master commissioned to present to the Grand Lodge of Ontario a gavel made of the wood of the "Maine," and I was then glad to express, as I am glad to express now, the thanks of an American citizen, because your home government at the time of our stress and strain had said to the other nations of the world "Hands off;" and I want to say to you that while, as one of the few remaining neutral nations of the world, and as an honourable nation to whom even the words on a piece of white paper mean something, as they do to your Government, we still, as some one has said at your Association meeting this afternoon, like to maintain the neutrality that is a boiling neutrality; and we are with you, my friends.

I am glad, on behalf of the Bar of my State, to bring you our greetings and to say that we are proud of the kind of neighbour that we are living with, and we are glad to go to and fro easily and freely from one country of law-regulated, liberty-loving citizens to another country of the same kind of people. My friends, one time I went down a well—it was when I was younger than I am now—and I had heard the statement that truth may be found at the bottom of a well. I did not exactly go down to find truth, but while I was down there, I began to think about it, and I looked around to see what truth I could find down there. Well, it was a

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dug well, and I found everywhere within six inches or a foot of my vision nothing but a pile of bricks running round and round in courses that led to the top. I was in a philosophical or philosophising frame of mind, and so I said that I would look above for light, and when I looked above all, I could see a small round patch of sky. There was not much light down there, so, after I had taken in the situation to my satisfaction, I went up to the surface, and I looked around again, and I found that my view was larger and broader, I could see more things; but it was in a manufacturing town, and I found that the smoke and the soot that came belching from the stacks of the factories of that town had obscured the vision and where I was, where that particular well was, were the grimy sooty hovels of the poor labourers that worked in those factories, and the grimy cars and the cheerless surroundings of the railroad tracks that led into the factory yards. But at that time my philosophising mood had taken possession of me, and I thought I would go where I could get the broadest outlook possible, and I climbed the mountain at the back of the town, and then I found that I was up where the air was clear, and I found that I was where my horizon had sensibly broadened, and I found that from where I stood I could see the orderly hamlets of three States, for I was down in our own south land, and as I have been sitting here, my friends, and as I have attended your meetings and heard the masterly papers and discourses that were delivered there, and I have seen the stress and strain under which you lovers and conservators of law and liberty, and lovers of your country are now in, and I have seen representatives of other States of our Union, in common amity with you, this experience of mine that day I went down the well occurred to me again; and do you know, my friends, that this profession of ours, and the good we can get out of it, depends entirely upon the view we take of it, and the place we are when we look at it. I do not know that it is so common in Ontario as it is in some of our larger cities of America, but there are lawyers, so called, at least they have been admitted to practise, who, when they look at their profession, are down in a well, and their view is cribbed and cabined and confined by the narrow courses of brick that shut off their vision just a short distance away from their own puny selves, and if they ever have any upward aspirations and look high, all they can see, because of their narrowed horizon, is a small

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patch of indistinguishable murky light at the top away up; and then there are others of our lawyers, perhaps of greater mentality than these first, perhaps of stronger brain power and keener vision than these first, who are up on the surface in the murk and the mire of lust for money and the greed for gain, and they look at their profession in a broader view, it is true, but still there is not much pure air, there is not much clear vision in their view of their profession; and then there are a few, there ought to be more—thank God there are as many as there are—who, when they look at their profession and its obligations and duties, the relations which they sustain to it, are up upon a mountain top in the pure ether of the upper sky where the vision is unconfined, and where there is no smoke of the petty greed for gain and grasping after money, their vision is unobstructed by anything and confined only to the principles of liberty and righteousness that there are or may be in the law suits which are brought to their office.

Gentlemen, I have just a word for you. I am not here to instruct you, I have come here to be instructed with you, and I am frank to say, and I am glad here publicly to thank our friend from Montreal, and to say to him that if I heard nothing else but his magnificent paper, with its pellucid clarity as to the principles of International Law, the entire time and trouble and expense of this visit would have been well repaid for that one paper. But if I can leave just one note with you as lawyers, perhaps deeper versed in the law, the principles of municipal law, than I am, perhaps older and more experienced in the practice of law than I am, it is this, that the true lawyer when he is considering the rights of his clients and whatever can be extracted from the other side climbs the mountain top before he begins to examine a case; he takes a broad idea of not how much money he can get out of that particular law suit, how much costs he can tax up against that particular litigant to whom he is opposed, but what principle of justice outraged or to be defended is inherent in this case; how can I, not as making a business of this profession of mine, but how can I, as a white-robed priest of justice, and sworn officer of the Courts of Justice best in this particular case, bring about the righteousness which ought to prevail, and the safeguarding and security of the rights which belong either to my client or to the other side, as the facts may develop. So long as the lawyers of

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any country carry out that sort of practice in their profession, the future of that country, whatever it may be, lies among the stars.

THE PRESIDENT: Mr. Frederick A. Fenning, who is the delegate to this meeting from the American Bar Association, has come all the way from Washington, D.C., to extend the greetings of that great association of lawyers to us. I have, therefore, very great pleasure now in calling upon Mr. Fenning.

MR. FREDERICK A. FENNING: Mr. President, gentlemen of the Ontario Bar Association, and guests: I deeply appreciate the reception from my friends immediately in front of me, for I noticed with some embarrassment that when the President was reading over the list of contemplated speakers set forth in the printed list they applauded most vigorously only those persons who had sent their regrets.

A distinguished Englishman, who some years ago was an honoured ambassador of Great Britain to my country, said that an English counsel in an American Court, or an American counsel in an English Court, always felt himself in a familiar atmosphere. Since arriving in your hospitable city I have not been in a Court room when the Court was in session, but I have found the familiar aspect in the session of your association that I had the pleasure of attending this afternoon, I have found evidences of familiarity in the relation between the Bench and Bar as so admirably set forth by Mr. Justice Lennox, I imagine that he spoke of the relation that he hoped some day would exist in the Dominion but which he believes now exists in the United States; and when I was taken by one of your members into that large room or alcove which I was told contained the reports of all the United States reported cases, I felt in a familiar atmosphere, but had something of a feeling of embarrassment when he added that you gentlemen in this jurisdiction called that room "the chamber of horrors." Lastly, it has been brought home to me that we away down in the District of Columbia have been familiar for these many years with some of the jokes that have been offered to us to-night by the preceding speakers. I am commissioned by the President of the American Bar Association, acting for the 12,000 and more members of that association, to bring you the cordial congratulations and greetings of the American Bar Associ-

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ation on this auspicious occasion. Many are the ties that bind us; they have been referred to once and again by some of the preceding speakers; they were not made at the memorable meeting in Montreal when the men of the American Bar met as the guests of the members of the Canadian Bar, they were only cemented at that meeting; they began years and years before; they were not confined to the spoken but the recorded word, for in the archives of the American Bar Association we have some records of statements and sentiments expressed years and years ago; I have found in searching those archives this quotation from an address by a distinguished American lawyer, made some years ago when the American Bar Association met in a southern city when there were no Canadians or English guests of honour, and this is what he said:—

"There is a wide belief that England won and holds her precedence by her soldiers and her ships; but she got the place and still holds it by her Bar. The Bar made the ships, the commerce, the learning, and more than all they made the Government as it now is. For centuries she has had the best law in the world, and her law and her language govern most of the world."

I beg your indulgence for a moment to add my personal word of appreciation at the honour that has been conferred upon me in that I was delegated by the President of our association to attend this meeting. It is no small honour for a man to be selected for such a mission; the honour is intensified beyond degree when he is sent to an association such as the association of the Bar of Ontario; but what bothers me is how am I to talk about our being bound together by the ties of the common law and all those other things that I had set forth in my carefully prepared extemporaneous remarks, when Mr. Justice Bissell included practically all of them in much more eloquent vein that I could, and those that he forgot Mr. Lodge took up. I am cognizant, though, of the fact that you, the lawyers here, are my jury, and while some are Judges and one or two like the distinguished Lieut-Governor, are laymen, still my jury is a jury of lawyers, and while you may be critical I know you will be kindly and I take my chances with you, as an eminent member of our Bar took his chances with a jury in our jurisdiction some years ago. The case on trial was one in which the attorney thought it necessary to use several Latin phrases

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in making his argument, and as he nearly finished the third of those the Chief Justice, who was of a testy disposition and had a defective speech, interrupted by, "C--c--c--counsel sp--sp--speaks in a lang--lang--language foreign to the Court." Instantly counsel responded, "So may it be; your Honour, but I see a number of very intelligent gentlemen on the jury." And while that may be taken by you gentlemen, my jury, as a compliment, I beg the distinguished jurists will not take it otherwise. Mr. Justice Lennox's remarks this afternoon reminded me of another story of that same Chief Justice which I may be privileged to tell. Mr. Justice Lennox spoke about the Judge being kindly towards the young practitioner, that he should not place the young practitioner in an embarrassing position; and this same Chief Justice had before him a young man who was making an argument and in the course of it he said, "Your Honour, I can find nowhere in the law any decision which is contrary to the law as I now state it to you;" and the Chief Justice said, "You--you--you cannot find any contrary decision?" and he said, "No, your Honour;" and the Chief Justice said, "There's going to be one in about five minutes."

Speaking of the criticisms that have been levelled against the profession, Mr. Justice Bissell gave me an opportunity to dwell for a moment upon one of those. There has been a growing custom for years of comparing the lawyer and the doctor, of comparing law and medicine, and that comparison usually leads to the suggestion that the law is stationary and medicine progresses. Not always, however, have these two professions been spoken of in comparison; we find away back in years gone by at least one occasion which shewed that they were then on the same plane; I refer to the earlier history of our fair city of Philadelphia, written when the thriving bird was ten years old. After the historian had recounted the ship chandlers, the grocers and the bakers of the community, he said, "Of doctors and lawyers I will say nothing, for it is a very healthy and orderly community." There comparisons began to be made about the time, or to be exact, at the time when physicians began to write on subjects not purely medical, and the comparisons made by those physicians between the law and medicine were about as readily made as they wrote prescriptions in dog Latin, and to the intelligent man they were just about as understandable. The

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lawyer considered it beneath his dignity to answer them, and so it has remained for the layman possibly not to vindicate the lawyer but certainly to shew up the physician in his true light, and I will mention two examples that have come under my observation recently of how the layman has shewn up the medical man. The first is the sign that the traveller sees as he journeys from Chicago and Milwaukee and goes to Zion City, the long painted board with letters that can be read as the fastest train goes by: "Zion City, no doctors, drugs, pork or oysters; a clean city for clean people."

The other is carved on the tombstone to the memory of a young woman, who, according to the inscription, after her burial had been taken from the grave to the dissecting room of a certain doctor whose name also appears on the tombstone; and after that statement is this verse:

> "Her flesh by fiendish man dissected,
> Her bones anatomised;
> Her soul, we trust, has risen to God,
> Where few physicians rise."

Mr. Chairman, as the march of the law has progressed, and as the men who have upheld those standards have gone forward with those standards, whether in this country or in my land, they have had as their incentive one single thought above all others that was well expressed by a distinguished member of our Federal judiciary in this short sentence, "Ours is an honourable profession." The occasion was a banquet that was tendered to this jurist upon his retirement for age. When it came to his time to speak he rose in his place and addressing the men who had sat with him on the Bench and the men who had practised for years in his Court, he reviewed the past forty years when he had been lawyer and Judge, what we might term the high spots in the progress of the law, as he recounted one after another of those things, he closed with the solemn phrase. "Ours is an honourable profession." Back of the personal friendships, back of the business ties, back of that spirit of chivalry and courtesy for which the men of this Dominion are noted, and in which I believe the men of my country do not fall from, back of all those things there is that tie which holds together the men who practise the law and the men who sit on the Bench, whether in your country or mine, and that is the thought that we are united because

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ours is an honourable profession. We say that not in a spirit of self-laudation but in a spirit of profound reverence for the law, the law of your land and the law of mine, and it is in that spirit that I bring you the welcome of the American Bar Association, the welcome from those who are bound with you in the practise of that profession of which ages and ages ago Hooker used that majestic sentence of law: "There can be no less acknowledged than that her seat is the bosom of God, her voice the harmony of the world."

Mr. E. F. Surveyer, of Montreal, on behalf of the Batonnier of the Montreal Bar Association, who was unable to be present, conveyed the greetings of that association to the Ontario Bar Association.

Several members called for a speech from Hon. Mr. Hearst, the Premier of Ontario.

HONOURABLE MR. HEARST: Mr. President and Gentlemen: I assure you I appreciate very much indeed the kind way in which you have received my name. I will promise you I will sit down in just a second. A few short weeks ago His Honour the Lieutenant-Governor of Ontario asked me to become the Prime Minister of this province, and to form a Government; I thought that along with that position I would be given some authority, that one would be able to command and to say to others, do this, and that they would do it; but my experience has been that you have no power to command but you must obey anybody that asks you, no matter what the request may be; and so to-night without a second's warning I have been called upon to say a word to you. When your committee waited upon me and very kindly invited me to attend this banquet the first thing they said to me was, "You may rest assured you will not be asked to say anything, and for one night, at all events, you can enjoy the dinner without having any apprehension about what is going to follow afterwards." I have enjoyed a good dinner, and it is now a case of false pretences to ask me to say anything at this time. The public seem to think that when a man enters public life he always has a talk-tank full, and at any time he can turn the tap on and immediately a discourse will follow on any subject befitting any occasion; it may be a Bar dinner such as this, when you have listened

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to such splendid, such eloquent and such well prepared speeches, or it may be at the opening of a bazaar or church gathering, but nevertheless you are always supposed to have that tank full, and the right dose ready to pour out.

I may say, however, that I have been more than stirred with the splendid addresses that I have listened to, both from the representatives from the Bar of Ontario and from the representatives of the Bench and Bar of the province of Quebec and of the great American Republic to the south of us. The spirit of loyalty, the spirit of good citizenship, the spirit of high ideals that have permeated all these speeches have been a rich treat to me indeed. At this particular time in the history of our country, and of the empire, we are cheered with the splendid sentiments we have listened to from our good friends from the other side of the line; we are cheered with the thoughts they have given us, with the sentiments they have expressed, and we know, in the great struggle in which the British Empire is engaged now, that we have at least the friendly neutrality of the great republic to the south of us; and I may say this to-day, and I know they will receive it in the spirit in which I say it, that the British Empire is not alone engaged in fighting the battles of the British Empire, we are fighting the battles of civilization, of freedom, in which they are just as interested as the British Empire is.

I will not take up your time further to-night, that would be a crime after the beautiful addresses you have just listened to. I was thrilled with the splendid address of my friend to the left, in which he expressed the conviction that you and I had faith that in any struggle in which we are now engaged for liberty and freedom we will prevail, we will win; but I am afraid, even before that day comes, it will cost much blood and much treasure, but I know, looking into the faces of my brethren of the Bar of the province of Ontario, that you are prepared to do your duty in whatsoever sphere you may be called upon to do it, and you will not be lacking in this hour of peril in his hour of danger to the Great Empire.

THE PRESIDENT: I think this audience will be very much disappointed indeed if the Attorney-General of the province of Ontario should not address us. I know this is another case of false pretences, but nevertheless I am willing to run the risk of an indictment. I therefore ask the Honourable Mr. Lucas to address us.

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HONOURABLE MR. LUCAS: I have been in the office of Attorney-General for a day and a half. I know the position of Attorney-General as we understand in this province is a non-partisan position; I say that seriously, that is the idea at any rate; but coming from the other department within a day and a half, it is perhaps too sharp a curve for me to take, and I am afraid if I made any speech to-night I might drift off on subjects that might be political, because I only make political speeches, and the first thing I know I would be making a political speech. However, I do say seriously, that in the department to which I have been transferred, and which I consider one of great importance, particularly to the Bar of the province, that I shall look, and I hope I shall not look in vain, for the loyal support of the Bar of Ontario irrespective of political leaning. It will be my ambition and my hope that in the administration of this department I will make it as non-partisan as it is possible to make the administration of a department under our system of government. I know I shall have the sympathy of the members of the Bar of this great City of Toronto, and, if I have, and their advice, I think on the administrative side of it, one can make a fairly good success of it; without your help and without your sympathy, one could not hope to do very much. I shall not speak to you further.

His Honour Judge Huycke, of Peterborough, spoke on behalf of the County Judges of Ontario.

THE PRESIDENT: I am going to call upon a gentleman to respond on behalf of the Press. Without the advantage of the energetic Press, especially, of course, of the City of Toronto, the Bar Association could not make much progress. We have a good many friends upon the Press, and it is, therefore, with very great pleasure indeed that I ask Dr. Macdonald, of the "Globe," to respond for the Press.

DR. MACDONALD: Mr. President, officers and members, guests of the Ontario Bar Association: I do appreciate the spirit of the invitation you extend to me to speak on behalf of the Press. I would speak with more ease to myself, and I hope with more satisfaction to you, if I had had a brief minute to have helped me out some. I have much respect for both the Bar and the Bench, having had something to

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do with both, and seeing before me here men who tried to help me out, and men who tried to help me in, and men who did not try to do either, both of Bench and Bar, that I really hesitate to express any opinions at all for fear they might go against the judgment of the Court. I had 38 writs for libel in six years, and that is about as many as a man wants to have; but I so cordially agree with all the great things you have said of yourselves that I am sure anything I might chance to say would be altogether in accord with the sentiments expressed this evening. I know right well that we of the great unwashed, the common crowd, the average man, the multitude in whose midst every newspaper man must stand, could not get along without the services which in your ideals at least you seek to render. I know quite well that you sometimes speak not altogether with respect of the Press; I know well, too, that the Press does not always speak with absolute respect either of the Bar or of the Bench, but I know we feel quite free, when the case is over, to discuss it when we have not either the Bench to admonish us or the Bar to tax us any further; but what you will permit me to say that in our ideals at least the Bar and the Press seek to serve the public, and that if we do not seek to serve the public at all, the Bar or the Press is not a profession, but merely a trade, and both are the worst forms of trade that the law allows to exist in this world. I respond for the Press of Canada, I respond if I have authority from them to say how much we feel, we who have to do with the crowd, the importance of your services, of your work, you men of the Bench and the Bar, in making the very thing that this world needs more than any other one thing, an ordered system of law to prevail among the nations, as you have made it to prevail among the individuals in society. We know right well—I remember having learned it as a boy in school—that nations fail where the Judges are unjust, but nations do not fail that are treated as Britain is treated, but they rise as Britain has arisen, and they shine as Britain as shone, and they will die as Britons have died, too much used to justice, and too much used to freedom to care for any life that is not just and free. It is your business, sir, to frame, as Haldane said, those terms of international law which the nations can live a civilized life within the neighbourhood of the world. That is your business; but you will permit me

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to say that without our help, you could not succeed in attaining your high ideals, unless you had the Press to do what you are not able to do, to take your great work, to drop upon it a drop of ink and produce the results that make millions think, to put back of your law, back of your institutions of justice, to put back of that an organized, intelligent, sympathetic opinion, because, sir, public opinion, after all, is the secret of the power of your great institutions, of freedom and of justice, and it is because of the institution that law has made that these two nations represented here to-night, live in such harmony as they do live. Permit me to say to you gentlemen from the United States that it is not the Anglo-Saxon blood that makes 80 per cent. and more than 80 per cent. of the public opinion of your republic back of the allies at this moment, it is not Anglo-Saxon blood, those of us who have not a drop of Saxon blood in us, wish to have a share along with you in the public opinion of the Empire and of the Republic, it is not Anglo-Saxon blood, Anglo-Saxon blood has got rather thin in your States, but it is your institutions of freedom and of justice, and it is because—I know American situation fairly well—it is because that the American people have learned this thing that their institutions of justice and of freedom and of democracy are at this moment menaced by Germany and are defended by Britain; it is not blood, it is something far more important to the world than blood, it is the institutions of justice, of law and of freedom, and making those institutions just and free is your business, but in putting behind them public opinion is our business, and we are both of us—you and I and all of us—will be responsible in the great day to come, you to make international law and we to make an international public opinion that shall be the force of the new civilization that is before us. We have done everything else but the thing we ought to have done; we have international commerce, international finance, international this and international that, but we are only beginning to set up international law, and we have not yet developed the international mind, and we are responsible in our nations and in the world to prepare the way for the international mind that shall be the power behind international law and make it a force for justice and for freedom for all the world.

The meeting closed with "God save the King."

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REPORT OF SPECIAL COMMITTEE ON REFORM IN APPEALS.

Your Committee begs to report that it has had under consideration the matter of appeals from trial judgments in County and Division Courts cases as originally submitted to it as well as the matter of appeals from trial judgments in cases in the Supreme Court of Ontario subsequently referred to it.

There is a lack of harmony in the procedure leading to these appeals although the policy of the Law Reform Act seems to have been to provide the same forum for the hearing of all such appeals. A County Court now, where the jurisdiction is not disputed, may entertain a case no matter what its magnitude may be. Subject to objection on the part of a defendant a County Court has, therefore, equal jurisdiction with the Supreme Court. There should be, therefore, your Committee thinks, as much similarity in the procedure in appeals from either as is possible. The present position, however, is that whilst the forum for the hearing of the appeal, viz., one of the appellate divisions consisting of 4 or 5 Judges, yet the steps leading to the hearing of the appeal are not the same. In a Supreme Court case by reason of the repeal of former Rules 491 *et seq.* of the Supreme Court it becomes necessary in a case in the higher Court to decide on the appeal if it is to take place within 15 days after the judgment complained of and to order the evidence therefor and set the cause down within that period. On the other hand in a County Court case under sec. 44 of the County Courts Act it does not require to be set down except at the first sittings commencing after the expiration of 30 days from the judgment complained of. It does not seem possible to set it down earlier even if ready. Now it frequently happens that it is impossible for a solicitor after a judgment adverse to his client—perhaps a judgment delivered a long time after the hearing—to obtain the instructions of his client and possibly after obtaining such instructions to take advice of counsel as to propriety of appealing within such a restricted period. Moreover it frequently happens that much turns on some phase of the evidence or the trial Judge's charge to a jury if the case be one tried before a jury, thus

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involving some delay in obtaining copy of part of the evidence or the charge so that unless a solicitor takes a chance and runs a risk he is debarred of appeal—the risk being the costs of an abandoned appeal if he decides later on that the circumstances will not justify him in going further. On the other hand, no real good is served by shortening the time for an appeal. The hearing of the appeal once launched in either case cannot be hastened assuming in all cases *bona fides.*

As between the two systems therefore your Committee recommends that your Association take upon itself to urge that Rules 491 *et seq.* be revived, or as there is a slight difference even then in the procedures, that that of the County Court in respect of time for appeal be adopted.

In the matter of appeals from Division Courts there does not seem to be any good sound reason for insisting that those appeals should be to a Bench of 4 or 5 Judges constituting one of the appellate divisions. Apart from the theory that the same appellate tribunal should hear *all* appeals no matter what the amount involved may be, there is nothing to recommend a continuance of the present system. Delays in hearing such appeals condemn the system. Your Committee thinks that the procedure of a few years ago in Division Court appeals should as nearly as possible be adopted, namely, an appeal to a single Judge as by sec. 152 of the Division Courts Act, R. S. O. 1887. There of course the appeal was to a Judge of the then Court of Appeal. These appeals, however, could readily be left to any Judge in Chambers. They should be, as other appeals are, without the appellant being called upon to give security. The amount involved to secure an appeal should be reduced to $50 and your Committee recommends also that in all such appealable cases either litigant may require the taking of the evidence in shorthand, for which privilege he should be prepared to deposit a fee to cover the necessary expenses of a stenographer and the usual fee allowed to a stenographer when no copies of the evidence are afterwards required.

All of which is respectfully submitted.

A. E. H. CRESWICKE,
Chairman.

Dated 6th January, 1915.

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REPORT OF THE COMMITTEE ON LAW REFORM.

To THE ONTARIO BAR ASSOCIATION:

The Committee on Law Reform begs leave to submit the following report:

1. As jurors play an important part in the administration of justice, a juror has a right to expect reasonable accommodation whilst he is discharging his obligations to the State. Jurors are not infrequently ordered about by officials as if their proper destination were the dock and not the jury box. "Cabined, cribbed and confined" in an inadequate compartment which would be scorned in a waiting room on a branch line in Thunder Bay, compelled to breathe a hopelessly polluted atmosphere, and often compelled to kick his heels about in idleness, when he knows his business is probably going to the dogs, it is not surprising that jury men should sometimes be contumacious, obstinate and unreasonable.

The unfortunate juror in waiting is provided with no real sanctuary he may go to and call his own. He must either sit in Court and listen to cases of no interest whatever to him, or loiter in draughty corridors; but he must not go beyond the range of an immediate summons to be called into the box to "well and truly try the issue between the parties."

Jurors should be provided with at least elementary decency and comfort. Why should jurors in waiting not be provided with a comfortable smoking and reading room?

2. Whenever a jury is unable to agree a Judge should have the power to decide the case. Lord St. Helier having before him a jury case which had already been tried twice expressed the opinion that it was a serious blot on our administration of the law that there are no means of settling a case when the jury disagree.

3. The mode of administering the oath should be changed. Many persons properly have objected to be sworn by "kissing the book" for sanitary reasons. Many people object to touching much less kissing a book which has been handled or thumbed by scores of unknown persons, and which may and often does contain the germs of disease. Your Committee recommends the adoption either of the

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Scottish form of oath or the form sancioned in the High Court of Justice in England. In England a witness after giving his name is told "to take the book in your right hand and raise your hand," he will then repeat "I swear by Almighty God that the evidence I shall give to the Court (and jury) touching the matters in question shall be the truth, the whole truth, and nothing but the truth."

No one should be called upon to kiss a book which Dickens called of the "underdone pie crust" color.

The form of oath sanctioned in Ontario surely need not be retained for the reason given by a Judge of one of our Division Courts, who said he understood the objection made to kissing the book was that it was covered with microbes and that the witnesses got ill through kissing it. His experience was that a great many people who committed perjury were punished in no other way.

4. Lord Herschell said the rule of *Merryweather* v. *Nixan* (1799), 8 Term Reports 186, that no contribution can be claimed as between joint wrongdoers "does not appear to be founded on any principle of justice or equity or even of public policy." (See *Palmer* v. *Wick and Pulteneytown Steamship Co.* (1894), A. C. at p. 324.)

This rule should be changed by legislative enactment.

5. An Act should be passed giving a right to a commission or other compensation in respect of the sale of land only under an agreement in writing to pay a commission or compensation, and such an agreement should state the amount or rate of the commission.

6. All claims and questions arising under a lease or other contract, and which by law or by the terms of the lease or contract are to be determined by arbitration should be heard and determined by a County Court Judge or Local Master in the county where the subject matter of the arbitration is situated, who should be given the power of an Official Referee under the Judicature Act, and of an arbitrator under The Arbitration Act.

7. Capital punishment, if not abolished, should be inflicted only by means of the electric chair.

8. Section 4 of "The Partnership Registration Act," R. S. O. ch. 139, should be amended so as to require a declaration of co-partnership to be filed within ten days next after the formation of the partnership. Such declar-

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ation is filed to give public notice of the fact of the formation of the partnership.

It is submitted that no good reason can be given why the declaration should not be filed within ten days from the date of the formation of the partnership.

9. The length of notice required to be given to terminate a tenancy where the right to terminate exists should be fixed by statute.

10. The length of notice required to be given to terminate a service contract if the duration of the service relation is neither fixed nor to be inferred from the nature or object of the service, should be regulated by statute.

Suggestions as to the length of the notice which should be given:

(1) If the remuneration is payable,—

(a) By the day, notice to be given on any day for the following day.

(b) By the week, notice to be given to terminate only for the end of a calendar week. Such notice to be given at the latest on the first business day of such week.

(c) By the month, notice to be given only for the end of a calendar month; it should be given at the latest on the fifteenth of the month.

(d) By quarters, or a year, or longer periods of time, notice to be given only for the end of a quarter, and only by giving six weeks' notice.

(2) The service relation of a person who is engaged for the performance of services of a superior kind, such as a manager, traveller, tutor, private secretary, companion, to be terminated by notice only at the end of one calendar quarter, and only by giving six weeks' previous notice, even if the remuneration is payable by shorter periods than quarters.

(3) If the remuneration is not payable at stated periods of time the engagement to be terminated by giving two weeks' previous notice terminating at any time.

11. The rules of practice relating to proceedings on mortgages should be changed and simplified as follows:—

(1) It should be possible to carry out a sale under the power of sale in a mortgage through a Master's Office, for a block fee, as quickly as a sale can now be effected under the present practice.

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(2) In a foreclosure action the time of the mortgagor and all subsequent encumbrances to redeem should be two months from the date of the Master's report, and it should be possible for a mortgagee to obtain a final order of foreclosure immediately after the period of two months has expired.

12. Your Committee can find no reason why an execution creditor should not have the right to sell his debtor's lands within two months or shorter period of time after an execution on a judgment against the debtor has been delivered to the sheriff. He can sell the debtor's chattels at once. Why should he be required to wait one year before he can sell the debtor's real estate

13. The jurisdiction of the Division Court in personal actions should be increased to $100 and there should be a right of appeal in all cases where the plaintiff claims $50 or upwards, to a Judge of the Supreme Court sitting in Court.

14. The following changes in the practice and procedure of the Exchequer Court are recommended:—

(1) Applications in chambers should be by motion and not by summons or petition (see Rule 287). Under Exchequer Court Rule 278 an application to the Court is by motion. Why a different practice in a chamber application?

(2) Rule 63 requiring a pleading containing more than 3 folios to be written or printed should be amended. Typewritten pleadings should be accepted.

(3) The seal of the Court when required should be affixed to the document and not to a piece of tape attached to a corner of the document. The seal should be affixed in a more permanent manner than is now the practice in the Exchequer Court.

In some Courts these old practices and customs which remind one of the days before the telephone and the typewriter, seem to die hard.

15. In all appeals to the Appellate Division, a Judge should be assigned to write the reasons for the judgment of the Court. Only one judgment should be published in the reports. Dissenting judgments should not be printed in the reports, but should be filed for reference.

16. The right of a creditor to a garnishee or attaching order before judgment, should not be confined to claims within the jurisdiction of the Division Court. He should

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have the right to an attaching or a receiving order before judgment in all the Courts.

17. An Act should be passed prohibiting a debtor from selling his business *en bloc* unless the proceeds of the sale are distributed *pro rata* amongst his creditors.

18. The Execution Act R. S. O. ch. 80, sec. 31, should be amended so as to make it possible to sell the land of a debtor even though it be subject to more than one mortgage.

19. In September last a statement was issued on behalf of the Government of Ontario that it was

"The intention of the Government at the next session of the Legislature to introduce an Act requiring mortgagees, holders of agreements of sale, options and other like securities, to secure an order from a Judge before taking proceedings either through the Courts or otherwise, to foreclose or forfeit such mortgages or securities for default in payment of principal, and giving Judges power, upon a proper case being made out, to relieve from forfeiture and to extend the time for payment of principal moneys.

It is not intended by such proposed legislation to in any way interfere with rent, interest or other payments of this character or in any case where a Judge does not feel that justice and right demand that some relief be given."

Your Committee is of opinion that in view of the present crisis an Act should be passed placing temporary restrictions on the right to enforce payment of claims of the kind mentioned in the said statement.

M. H. LUDWIG,
Chairman.

REPORT OF COMMITTEE ON LEGAL HISTORY.

THE PRESIDENT AND MEMBERS OF THE ONTARIO BAR ASSOCIATION.

GENTLEMEN,—

Your Committee on Legal History feel that they should in the first place acknowledge the good work of Mr. W. S. Herrington, K.C., of Napanee, in this connection at the last meeting of the Ontario Bar Association, and through his published work regarding the historic Bay of Quinte District.

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While the Association mourns several members throughout Ontario, who have passed to the great Forum above during the year, there was no more outstanding personality, no more assiduous worker for the good of the Association than the late James Bicknell, K.C., and your Committee have been privileged to receive from Mr. W. J. McWhinney, K.C., the appended sketch of his career which is to be considered as embodied in this report. Other tributes have also been received from other members of the Bar.

Your Committee are also privileged to present to the meeting an address, full of historical reminiscences, of Colonel J. E. Farewell of Whitby, which he will personally deliver at the annual meeting.

"The interesting nature of what may be anticipated, will be apparent, when it is realized that the address will deal with Hugh N. Gwynne, and his familiar, John Molloy; experience in Chambers when Judges presided; short courses of lectures by Edward Blake, Adam Crooks, and others; "Bill" Heward, and other Hall officials; the Smeathman Estate and Baldwin, Paterson, Wilson and Beaty; 1821 to 1864; John Montgomery of Rebellion fame, and Chief Justice Robinson's funeral; a causerie that will appeal to young and old. The past and present here united through a genial interpreter."

Your Committee hope to have completed by the date of the annual meeting the Roll of Honour embracing the names of those barristers, solicitors and students-at-law who are living up to the old traditions of the profession (and to the present gallantry of their British brethren), on Imperial service at the front or with the Overseas Contingent now being prepared for the stern duty which lies before them and us.

"What constitutes a State?
Men who their duties know, and know their rights,
And knowing dare maintain."

Our absent brethren are at present writing another page of legal history and are factors in the life as well as sharers in the sentiment of the British Empire.

Your Committee are pleased to record during the past year the organizations of Rifle Associations and Corps Reserve in connection with the historical centre of Osgoode Hall, and trust that these organizations may be continued even after permanent peace shall have been secured through

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the making of a new and indissoluble international contract with a powerful international Court, strong enough to punish any nation that will violate its own honour and its own treaty. We have spoken of our brethren absent on service. What of ourselves? Let us not forget what Henry Vandyke has so well said in "The Builders."

"What bulwark shall secure,
The shrine of law, and keep
The fount of justice pure
Then, ah then, as in the olden days—
A rampart of indomitable men!
All that our fathers wrought
With true prophetic thought
Must be defended."

Respectfully submitted,

W. N. PONTON,
Chairman.

Belleville, December, 1914.

THE LATE JAMES BICKNELL, K.C.

Born in Battersea Park, London, England, on the 26th April, 1862, came to Canada with his father and family 26th June, 1872, and settled in Hamilton. Was brilliant as a student, and two of his confreres, the late George Kappele, K.C., and Mr. D. J. I. McKinnon, rival students for gold medals, had to sever their examinations so that each might succeed in his object and each did succeed and graduated with highest honours and each receiving a Gold Medal Scholarship. He commenced his career as a student with S. F. Lazier, K.C., of Hamilton, in 1879, and subsequently was a member of the firm of Fuller, Nesbitt & Bicknell, later Nesbitt, Bicknell & Gauld, with which firm he remained until coming to Toronto in the year 1894. During his career at the Bar in Hamilton he was associated with the late Judge Sinclair of Hamilton in his publications on the Liquor License Act, Landlord & Tenant Act and the Division Courts Act, and later in conjunction with Mr. Seager he published Bicknell and Seager's work on the Division Courts Act in 1893, contributing about the same time able articles to legal publications on interesting subjects such as "Fraudulent and Collusive Judgments,"

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"Married Women's Property Act," etc. When he came to Toronto in 1894 as a member of the firm of Messrs. Laidlaw, Kappele & Bicknell, he soon became prominent as counsel for the Imperial Bank of Canada, Toronto Railway Company, and in the formation of the York Radial Railway comprising the Metropolitan, Scarboro' and Mimico Railways. In 1900 in conjunction with Mr. Arthur J. Kappele he published "Bicknell & Kappele's work on Practical Statutes," and with Mr. Seager a second edition of his work on the Division Courts Act, the third edition of which he had prepared ready for publication prior to his death. He was created a King's Counsel in the year 1902, and later was elected a Bencher of the Law Society and also a member of the Senate of Toronto University.

In his earlier years at the Bar so exceptional was his memory that one distinguished Judge before whom he frequently appeared referred to him as "A wonderful cyclopedia of case law," and this remark attached to him for many years. After his removal to Toronto he soon took a leading position as counsel, and in addition to the bank and railways he represented he became counsel for the Canadian Bankers' Association, as well as for many influential corporations, financial and banking institutions, and was generally known as a prominent corporation counsel and advisor. He was from his earliest days an intuitive lawyer and his exceptional memory, coupled with his general proficiency extraordinary executive abilities, indefatigable energy and untiring zeal, created for him a position in the legal profession of this Province with few peers. He was a special example to members of the profession of what one man can accomplish as in addition to his extensive clientele he was ever ready to undertake his share of other burdens and was a valued chairman of the Educational Committee of the Benchers, a prominent Mason of the 32nd degree, and an active member of St. Paul's Anglican Church. For many years he was a close and intimate friend of Rev. Canon Sutherland of Hamilton in the Diocese of Niagara. He reminded one in a sense of the late D'Alton McCarthy owing to his general proficiency and preparedness for any Court, and very frequently appeared as counsel in prominent cases before the Privy Council of London, England. He had before him a brilliant career unlimited as to possibili-

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ties and his talents were appreciated by the largest financial institutions, and by the Government of the day for whom he acted in such important cases as the fixing of the western railway rates and the carrying into effect of the assistance voted the Canadian Northern Railway Company by the Government of Canada.

Socially he was very popular and as a member of the Royal Canadian Yacht Club, Toronto, Albany, York, and many golf clubs, he made many friends and was ever ready with a good story and able to appreciate a good story-teller.

For many years he was a consistent and valued supporter of the Ontario Bar Association, which honoured itself by electing him as its Honorary President.

In the present year he ably assisted Sir James Aikens in the formation of the Canadian Bar Association and at its inauguration meeting became Vice-President for the Province of Ontario and was the head of the Ontario Executive of that association.

He contributed to the Ontario Bar Association some important papers including in chief "Proposed Bankruptcy Legislation," on which subject he disclosed exceptional business foresight.

No counsel was more easily approached, none more considerate of his associates in the friendly practice of our profession, and none more loved and respected by the student body, to whom he was always an open book and an ever constant and consistent friend.

THE LATE JUDGE, WILLIAM FULLER ALVES BOYS.

His Honour Judge Boys passed to the Great Beyond, on Sunday morning, the 29th November, 1914, at the ripe old age of 81 years.

He was the youngest son of the late Dr. Henry Boys, F.L.S., who was a surgeon with Wellington's army in Portugal and it was there he met his future wife Maria da Parifecacao, daughter of Don Manuel Alves of Lisbon. In 1833 they sailed for America, landing in New York, after a long and tempestuous voyage in a sailing vessel, and shortly after the future Judge of Simcoe county was born (March 12th, 1833).

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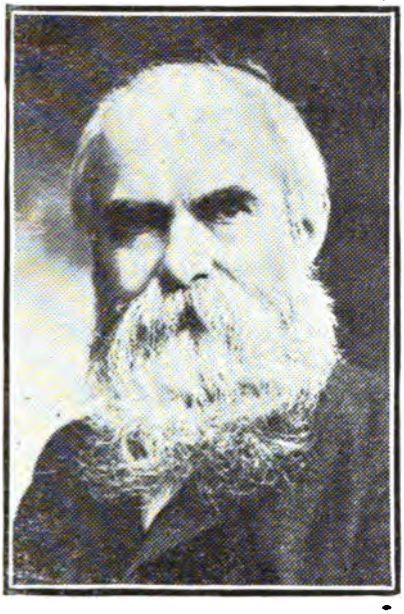
Dr. Boys settled at Whitby, Ont., but a few years later moved to Toronto, he having received the appointment of Bursar of King's College and Upper Canada College. The late H. R. A. Boys (for many years treasurer of Simcoe county) at that time kept a store at Barrie and upon his advice Dr. Boys moved his family to that town in 1850.



THE LATE JUDGE BOYS.

Judge Boys was educated at Upper Canada College and University of Toronto (LL.B. 1861) and was called to the Bar the same year. His practice at the Bar was attended with much success, he having been associated in partnership with the following distinguished lawyers; the late D'Arcy Boulton, the late Judge Lount and the late D'Alton McCarthy.

Before his appointment to the Bench, Mr. Boys took an active interest in public affairs. On September 11th, 1856, he was appointed Lieutenant in the 5th Batt. Simcoe Militia, and at the Fenian Raid was called out in defence of his country. He was Mayor of Barrie three terms and served many years on the High and Public School Boards. He was one of the trustees appointed in connection with the grant made to the H. & N. W. Ry.

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He married Mary Frances, daughter of the late Rev. Canon Morgan, in July, 1883, and they had but one child, W. A. Boys, K.C., M.P.

On the retirement of Sir James Gowan, K.C.M.G., he was appointed Junior Judge for the county of Simcoe and Local Judge of the High Court on September 28th, 1883, the duties of which offices he filled with credit to himself and to the country, and to the general satisfaction of the public and the Bar.

His Honour retired from the Bench of Simcoe county under full allowance, on September 28th, 1908, having served on the Bench for 25 years and having passed his 75th birthday, both of which must concur to entitle a retiring Judge to more than two-thirds pay.

His Honour was the author of "Boys on Coroners" which reached its fifth edition and is the recognized authority on the subject in Canada.

In the early days Mr. Boys was a prominent Orangeman having occupied the position of County Master. He was also a charter member of St. George's Society. Throughout his life Judge Boys was a strong temperance man. He was very active in support of the cause up till his appointment to the Bench when he completely disassociated himself from societies of every kind.

Conservative principles had in him a very ardent supporter and he held many offices in party organization. On one occasion he essayed unsuccessfully to gain a parliamentary seat as representative for Muskoka.

He was one of the oldest members of Trinity Church, Barrie, and for many years performed the duties of lay reader and took the service in Allandale.

Judge Boys was of a kindly and generous nature and always took a deep interest in the affairs of his town and country. His duties on the Bench were discharged with the utmost conscientiousness and fidelity—and both in his private and judicial capacities he enjoyed the esteem and respect of all classes.

The funeral took place on Tuesday afternoon when a large number of citizens assembled to shew their respect. Among them were Judge Vance, Judge Wismer, the county officials and about a score from the county Bar. From the house, the cortege proceeded to Trinity Church, where service was conducted by the Rector and Vicar. A short eulogistic

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address on the life and character of the deceased was delivered by Rev. Canon Reiner. Interment took place at the Union Cemetery. The pall-bearers were G. A. Radenhurst, Rev. Vivian Morgan, D. M. Stewart, C. E. Stewart, Thos. Boys and H. E. Choppin.

REPORT OF THE LEGISLATION COMMITTEE OF THE ONTARIO BAR ASSOCIATION FOR THE YEAR 1914.

To the President and Members of the Ontario Bar Association:

Since the last annual report of the Legislation Committee of your Association was made, the Revised Statutes of Ontario have appeared. These came into force on the 1st of March last. A survey of these, however brief, would be impracticable in the scope of this report, and many of the Acts now incorporated in the Revised Statutes have been dealt with by former committees. It has, therefore, been thought best to confine this annual report, so far as it relates to Ontario Legislation, to the Statutes of 1914, 4 George V.

Compared with some preceding years, the volume of Provincial Legislation passed during the Session is small, and much of it does not call for special comment.

The 1914 Ontario Statute comprises 56 Public Acts, some 20 of which appear to be original or substantive and the remainder amending Acts.

Of the 20 original or substantive measures, some 6 or 8 relate to constitutional, political, economic and such like matters affecting the State as such; some 6 others deal with educational and charitable matters.

Of the remainder, a few have been selected for special comment.

Chapter 2 is an Act to confirm the Revised Statutes of Ontario, 1914, and to correct certain clerical and typographical errors therein. This Act in effect confirms the proclamation of the Lieutenant-Governor-in-Council, dated February 12th last, bringing into force the Revised Statutes on, from and after the 1st of March, 1914. It further provides that, by reason of the passing of this Act, the Legisla-

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ture is not to be deemed to have adopted any judicial interpretation which may have been placed upon the language of any of these Revised Statutes.

The Act also appends a Schedule containing 38 corrections of errors and minor amendments to the Revised Statutes, which are made retroactive to the date when the Revised Statutes came into force.

Chapter 4—an Act respecting representation of the people in the Legislative Assembly—repeals the Representation Act in the Revised Statutes of 1914, delimits the boundaries of the electoral districts throughout the province and increases the representation to 111 members.

Chapter 6, known as the Political Contributions Act, prohibits contributions by corporations, liquor license holders and public contractors for the purpose of promoting the election of any person to the Assembly or to any public office.

Chapter 10 materially amends the Succession Duty Act, 1914, making substantial increases in the duties to be collected from the estates of deceased persons.

Chapter 14, the Mining Amendment Act, contains a number of salutary provisions to prevent the invalidating of claims through innocent misdescription, or forfeiture through noncompliance with regulations under certain stated conditions.

Chapter 15, known as the Radium Act, is intended to promote, by the offer of substantial rewards, the discovery in paying quantities of that rare and scientific, but elusive, mineral known as radium.

Chapter 16, known as the Power Commission Act, 1914, purports to amend and supplement the Act of the Revised Statutes in numerous details. A new part is also included relating to the supply of power for street lighting in townships.

Chapter 21, the Statute Law Amendment Act, is the usual omnibus measure of goodly proportions. It purports to amend upwards of 40 separate Acts. Among these may be mentioned: (1) The Judicature Act, by providing for the appointment of deputies by Local Registrars, County Court Clerks, and other like officers, and making the provision retroactive as of April 16th, 1912. (2) The Execution Act, by making certain provision for taking chattel mortgages in execution. (3) The Summary Convictions Act, by providing for appeal from conviction or order of dismissal upon the

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certificate of the Attorney-General. (4) The Wills Act, by repealing sec. 37 of that Act and substituting a new one relating to gifts to children predeceasing the testator leaving issue, whereby the gift takes effect whether death occurs before or after the making of the will. (5) The Assignments and Preferences Act, by adding a new sub-section, to sec. 27 of that Act, whereby the assignee may intervene and force the prosecution of an action brought prior to assignment against the assignor. (6) The Local Improvement Act, by enabling a majority in value of the owners of any land specially assessed for a proposed local improvement, to petition the Ontario Railway and Municipal Board for relief. (7) The Theatres and Cinematographs Act, by numerous amendments and new provisions for the better regulation of these places of amusement.

The Land Titles Act is amended by ch. 24 in several particulars, the most important of which relate to registrations and proceedings dealing with tax sale titles, and enabling a purchaser at such a sale to lodge a caution.

The most important and outstanding piece of new or original legislation in 1914 Statutes is unquestionably the Workmen's Compensation Act, ch. 25. It is the result of several years of research and careful study, as well as of public investigation on the part of our distinguished jurist, Sir William Meredith, Chief Justice of Ontario, who was specially commissioned by the Government to draft the Bill. It undoubtedly represents the most advanced, well considered and approved legislation on the subject to be found in any country, and it greatly redounds to the credit of the Provincial Legislature that Ontario should be the first province in this Dominion and among the first two or three legislatures on this Continent, to place upon a statute book such a far-reaching and progressive measure. Socialistic and paternal as it may seem in its tendencies, it is nevertheless an instance of the growing humanitarianism of our times, under the compelling influences of modern civilization and Christianity.

In its earlier and contentious phases, the draft measure was the subject of lengthy, keen and critical discussion by representatives of the parties most intimately affected by its provisions. Other classes only indirectly affected appeared before the Commissioner to justify their claim for special consideration. Here it is worthy of more than passing comment that, although no legislative measure for many years

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has more seriously threatened to affect the practice and income of the legal profession in this province, yet no word of protest was heard from it or any of its members, and in thus sacrificing their pecuniary interests to the public weal, they have not only placed their stamp of approval on the measure, but they have at the same time given a meritorious example of their loyal and patriotic devotion to the State and displayed a commendable desire to promote its highest welfare.

Germany was the pioneer in this legislative field and the principle of its enactment is in the main adopted in our present Statute, but certain features of other foreign legislation on the subject, together with many new and original provisions, have been engrafted into it.

The basic principle of the Act is one practically of insurance to workmen, as well against injuries sustained, as also against certain industrial diseases contracted in the course of employment. The old legal formulae, "contributory negligence," "common employment" and such like defences are done away with, and the rights of workmen to compensation are hereafter to be governed by the provisions of this Act, where applicable, in lieu of all the former rights of action, statutory or otherwise, to which they or their dependents were entitled against their employers.

Contractual waiver of rights, assignment of compensation, deduction of wages or contribution to an indemnity fund by workmen is prohibited.

"Accident" is defined to include a wilful and intentional act not being the act of the workman, and a fortuitous event occasioned by a physical or natural cause.

"Workman" does not include an "outworker," or person not working on the premises under the control or management of the employer, nor does it include those engaged in clerical work and not exposed to the hazards of employment.

To participate in the benefits, the workman must be disabled for at least seven days from his full earning power, and the accident must not be attributable solely to his serious and wilful misconduct. In the case of death or serious disablement, however, his dependents or he himself, as the case may be, are or is entitled to participate, notwithstanding his misconduct.

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Part 2 of the Act provides a remedy by action for workmen not falling within the general scheme of the Act, some of the former defences being now no longer available.

Provision is made for notice of accident, as well as of waiver thereof in the discretion of the Board under certain contingencies, for medical examinations, for the appointment by the Board of a medical referee, and for enabling the Board to require an employer, individually liable to compensate, to insure his workmen.

A scale of compensation is included, based on the earning power of the individual workman.

The Workmen's Compensation Board is constituted of three members as a body corporate, and their tenure of office is during good behaviour, but they may be removed at any time for cause. Upon attaining the age of 75, their appointment lapses. Any two commissioners constitute a quorum and the Board is invested with the powers of the Supreme Court for compelling the attendance and examination of witnesses and the production of documentary or other evidence.

The jurisdiction of the Board is exclusive within its domain and its decisions are not subject to review in any Court.

The Board is also empowered to award a reasonable sum, presumably in the nature of costs, to a successful party to a contested claim. Its orders may be enforced in like manner as a judgment of the Court.

To assist in defraying expenses of administration, provision is made for the payment to the Board of the sum of $100,000 by the Government.

The Act further provides for the creation and maintenance of an accident fund and divides the employers and industries affected into two broad classifications, schedules of which are appended to the Act, as also a schedule of industrial diseases, power being granted to the Board from time to time to re-arrange or supplement the same.

One schedule of employers or industries embraces what is generally known as Public Utilities, such as steam, electric and street railways, telephone, telegraph, express and navigation companies; all other employers or industries fall within the other classification.

The former class is made individually liable to pay the compensation awarded by the Board; the latter contributes to the accident fund, out of which the Board makes payments.

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The Act expressly provides that it shall not apply to farm labourers or domestic or menial servants or their employers, and it also repeals the Workmen's Compensation for Injuries Act, ch. 146 R. S. O. 1914, and it is to be brought into effect on a day fixed by proclamation. Since the passing of the Act the proclamation has been issued bringing it into force on January 1st, 1915.

The administration of this Act will undoubtedly be marked with many difficulties in the practical working out of its provisions, as has occurred in the case of similar legislation in other countries, and will be watched with close interest not only by those intimately affected, but also by the country at large.

The Ontario Companies' Act is amended by ch. 29, by enabling an aggrieved shareholder to apply to a Judge of the Supreme Court for investigation and relief in cases where a shareholder or a class of shareholders is or has been unfairly dealt with by the majority.

The Ontario Insurance Act is amended by ch. 30, by considerable amendments and supplementary provisions. Hereafter where a company undertakes automobile insurance, the authorized capital stock shall not be less than $100,000, of which $75,000 must be subscribed, and not less than $20,000 paid up thereon. The word "agent" is also specially defined and provision made for his certification and otherwise.

An amendment also appears requiring underwriters' agencies transacting insurance business within the province to take out a license therefor. Every policy so issued must bear the name of the principal, guaranteeing or managing company in a conspicuous manner.

New legislation also appears in the Hydro-Electric Railway Act 1914, ch. 31, which enables a corporation or two or more corporations, upon being authorized by the Lieutenant-Governor in Council so to do, to enter into an agreement with the Hydro-Electric Power Commission of Ontario for the construction, equipment and operation of an electric railway to be operated by electrical power or energy supplied by the Commission. The funds for the purpose are to be provided by the issue of bonds by the Commission chargeable against the undertaking, the debentures of the corporations interested being deposited as collateral security for the payment of the bonds, and neither the province nor the Commission being liable for the payment thereof, except to the extent of the

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moneys received by the Commission from the municipal corporations. A by-law for the purpose, with the agreement attached, shall be submitted to the electors of the municipalities concerned for ratification.

The Municipal Amendment Act 1914, ch. 33, comprises the usual annual grist of amendments to this complicated Act, too intricate to refer to in detail.

The Public Utilities Act is amended by ch. 35, prohibiting the sale of gas containing sulphuretted hydrogen.

The Liquor License Act is amended by ch. 37, by imposing further restrictive and regulative provisions upon the trade and for the better administration of the law.

The Employment Agencies Act, ch. 38, provides, under penalties for infraction, for the licensing by the Provincial Treasurer of such agencies. Where more than one office is maintained by any agency, a license must be taken out for each one. Regulations may also be made by the Lieutenant-Governor in Council governing the conduct of such business and for other purposes. The Act also comes into force upon proclamation of the Lieutenant-Governor in Council.

The Ticket Speculation Act, ch. 39, prohibits under penalties speculative dealings in tickets of admission to theatres and other stated places of amusement, exception being made in certain specified cases.

The Fire Marshals Act, ch. 41, provides for the appointment of an officer known as the Fire Marshal to be appointed by the Lieutenant-Governor in Council, together with such subordinate officers and assistants as may be required. The officer is authorized, among other things, to investigate the cause, origin and circumstances of every fire occurring in Ontario by which the property of His Majesty or of any person, has been destroyed or damaged and so far as possible determine whether such fire was the result of carelessness or design.

We cannot close this chapter of our report without referring to the irreparable loss the Legislature and the province, as well as Canada and the Empire at large, have suffered during the year through the death of Sir James Whitney, Premier of the province for the past decade.

Vigorous, progressive, even radical, though unsympathetic towards certain popular movements, such as Prohibition, Single Tax and Female Suffrage, he has left the indelible imprint of his forceful character and principles upon the

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legislation of his period. He singularly possessed the confidence of all classes of the community, among whom his integrity and capacity were never called in question.

The province was his peculiar care and heritage, but he never lost sight of the wider interests of the Dominion and the Empire. His staunch imperialism in those early and momentous days of August last is well exemplified in what may well be called his valedictory appeal to the people of Canada, which it is fitting here to quote:—

"The momentous crisis we now face makes plain what Canada's course must be. That course is to exert her whole strength and power at once on behalf of the Empire. We are part of the Empire in the fullest sense, and we share in its obligations as well as its privileges. We have enjoyed under British rule the blessings of peace, liberty and protection, and now that we have an opportunity of repaying in some measure the heavy debt we owe the Mother Country, we will do so with cheerfulness and courage."

DOMINION STATUTES 1914.

In the Statutes for Canada, 1914, 4-5 Geo. V., there appears a number of Imperial Orders-in-Council, of considerable importance, but too lengthy to refer to in detail. Mention may be made of the Official Letters from the Governments of Germany, Belgium, Austro-Hungary to the effect that their respective consular officers have authority to receive articles and money of citizens of those countries not resident in Canada, but dying therein, and to give valid receipts therefor.

Of the orders of the Governor-General in Council, also published with these Statutes, we note those relating to: (a) The Inspection and Sale Act, relating to the importation of Fruit into Canada; (b) The Destructive Insect and Pest Act; (c) Amending the regulations established by the Order-in-Council of 30th November, 1909, under the Animal Contagious Diseases Act as to the importation of Animals from the United Kingdom; (d) Amending the regulations relating to Customs' Duties: (e) Fixing certain standards of quality under the Adulteration of Food Act; (f) Relating to the Weights and Measures Act; (g) Establishing Standards of quality and limits of variability for vinegar and similar articles under the Adulteration Act; (h) Making regulations

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under the Immigration Act for protection to immigrants seeking employment from companies, firms or persons carrying on business of intelligence officers or employment or labour agencies in Canada.

Proclamations also appear bringing into force the following Acts:—(a) The Act respecting the Treaty of Commerce and Navigation between Great Britain and Japan, as of May 1st, 1913; (b) The Act respecting the Trade Agreement between Canada and certain of the West India Colonies, as of June 2nd, 1913; (c) The Animal Contagious Diseases Act of 3-4 Geo. V., as of July 15th, 1913; (d) 2 Geo. V. ch. 43, to amend the Prisons and Reformatories Act, as of January 24th, 1914; and (e) The Act of 3-4 Geo. V. relating to Parcel Post, as of April 1st, 1914.

Of the many important statutes passed during the session of 1914, we have selected the following for special mention, as appearing of most general interest in this province, namely:—(a) An Act to Amend the Civil Service Insurance Act. This Act contains some important amendments, making provision for cases where all the beneficiaries die; where the insured is a widow or a spinster; for cases of beneficiaries dying during the insured's lifetime; and fixing the minimum and maximum insurance payable at death at $1,000 and $5,000, respectively; (b) An Act to Amend the Weights and Measures Act by fixing metric standards and providing for the regulation of same; (c) The Dairy Industry Act, 1914, an important Act dealing with the quality of milk for manufacturers and prohibiting the sale of substitutes for butter or re-manufacture thereof, or the importation into Canada or selling or offering for sale butter not complying with the prescribed regulations, and prohibiting cheese from being made with skimmed milk or the adulteration thereof. It also provides for the appointment of inspectors and for the Governor-in-Council making regulations to enforce the Act; (d) An Act to Amend the Adulteration Act. It protects the dealer by enabling him to require the officer procuring any sample from him to annex to the sample or package containing the same, his name and address, and to properly secure such package with seals, the better to ensure its transmission unbroken to the Department. The certificate of the analyst is to state the name and address on the package and that it had not been opened prior to reaching him, in addition to the result of his analysis. The Act also prohibits

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the sale or keeping for sale of maple sugar and maple syrup, except of the prescribed standard, and provides restrictions as to sale of honey; (e) The Cold Storage Warehouse Act empowers the Governor-in-Council to make regulations for the supervision of all cold storage warehouses, the appointment of inspectors, etc., and penalties for infraction; (f) The Companies Act Amendment Act, 1914, provides for share warrants and regulations as to same; (g) An Act to Amend the Criminal Code, prohibiting the publication of false advertisements to promote sales of any real or personal property; (h) The Explosives Act makes important provisions in regard to the importation, manufacture and use of explosives, for the issuing of licenses for factories and magazines, the appointment of inspectors and the making of regulations by the Governor-in-Council; (i) An Act to Amend the Inspection and Sale Act, amending and enlarging the scope of the original Act and making special provisions as to the marking of barrels, bags and packages and verifying of weight; (j) The Loan Companies Act, 1914, meets a long-felt requirement in legislation regarding Dominion loan companies. It comprises 92 sections, with two schedules, and your Committee is impressed with the opinion that it is a carefully and skillfully worded measure and that the provisions embodied therein for the incorporation, organization and regulation of the affairs of such companies should be found satisfactory in practice; (k) An Act respecting British Nationality, Naturalization and Aliens, also of considerable length. It defines what is meant by a natural born British subject and provides for the naturalization of aliens, the national status of married women and infant children, loss of British nationality by foreign naturalization, gives power to naturalized subjects to divest themselves of their status in certain cases, provides for the status of aliens in regard to the taking, holding and disposing of real and personal property, and for regulations being made by the Governor-in-Council. The Act takes effect on January 1st, 1915; (l) The Representation Act, 1914, readjusts and rearranges the constituencies throughout Canada for Dominion electoral purposes; (m) The Trust Companies Act, 1914, containing some 80 sections, with schedules appended, is also an Act of special importance and interest; such companies must now be incorporated under this Act and not by Letters Patent under the Companies Act. It defines the powers and regu-

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lates the conduct of such undertakings, provides for the requirements necessary for commencement of business, that the capital stock shall not be less than $250,000, and the amount to be subscribed and paid up, the issue of shares and their classification, etc. . . . It provides that contracts, agreements, engagements or bargains made and every bill of exchange drawn, accepted or endorsed, every promissory note and cheque made, drawn, or endorsed on behalf of the company by any agent, officer or servant of the company, in general accordance with his powers as such, shall be binding upon the company, and it shall not be necessary for a seal of the company to be attached thereto; and that the person signing such documents as agent, officer or servant of the company shall not be thereby subject individually to liability to a third person.

Suggestions as to Further Legislation.

In this connection, your Committee has had under further consideration the recommendations made by your Legislation Committee of last year and incorporated in its annual report, copies of which were duly forwarded to the Honourable the Minister of Justice of Canada and the Honourable the Attorney-General of the Province, and we are of the opinion that we cannot do better than again to approve and recommend for adoption the valuable suggestions made in that report, and as parliaments and legislatures are notoriously slow in acting on such recommendations, it would be well, in the opinion of your Committee, to take such action as might be deemed advisable towards securing their careful consideration by these legislative bodies.

Reference may be had to the last report for these suggestions at length, but to repeat here the substance in brief, they include, among others, the following:—

(1) Providing for amendments to the Division Court Act:

(a) To expedite service of process where bailiff in default or unable to serve.

(b) To enforce payment of petty claims by less expensive and more expeditious procedure. This might be effected by a statutory notice signed by the claimant's solicitor, analogous to the statutory form adopted for sale under a power of sale in a mortgage.

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(c) To permit appeals from this Court direct to a Judge of the S. C. O. in Chambers and limiting appeals to claims in excess of $50.

(d) To enable a D. C. Judge to allow a counsel fee of $5 to the successful party appearing by solicitor in claims over $50, where particulars equivalent to a specially endorsed writ in the S. C. O. are given.

(2) In non-contentious matters under the Surrogate Courts Act, enabling a solicitor in conduct of a matter to take any affidavits required therein.

(3) By prohibiting Crown Officers, who are practising solicitors, from engaging in private practice, and discontinuing the present anomalous and dual position of such officers, where duty and interest are in open conflict.

(4) By requiring declarations under partnership agreements to be registered within thirty days in lieu of the extended and unreasonable time now allowed.

(5) That salaries to the Judges, and especially County Court Judges, should be substantially increased in view of the increased jurisdiction and the greater work and responsibility thereby incurred.

(6) That a Federal Bankruptcy Law should be enacted by the Dominion Parliament, the better to promote uniformity and justice in such administrations throughout Canada.

(7) That greater restrictions should be imposed against the common practice by some manufacturers and wholesale dealers of fixing uniform prices, to be charged by retailers, and refusing to deal with those not agreeing to conform to their schedules, this practice being in restraint of trade and contrary to public policy.

All of which is respectfully submitted.

Signed on behalf of your Committee,

N. B. GASH,
Chairman.

December 30th, 1914.

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RESOLUTIONS ADOPTED.

The following is a summary of the resolutions adopted by the Ontario Bar Association:—

It was moved by Mr. N. B. Gash, seconded by Mr. F. D. Kerr—that the report of the committee on bankruptcy legislation be referred to the Council with power to act.

It was moved by Mr. H. H. Dewart, seconded by J. S. Davies—that the Council be authorized to print and distribute the papers on bankruptcy prepared by Prof. D. W. Amram and the late Mr. James Bicknell.

It was moved by Mr. E. J. Hearn, seconded by Mr. C. A. Moss—that a presentation be made to Mr. R. J. Maclennan, the corresponding secretary, and Messrs. Hearn, Moss and Mr. J. J. Drew were appointed a committee to take the matter up.

It was moved by Mr. F. D. Kerr, seconded by Mr. E. J. Hearn—that for the future it is not advisable to have an official organ.

A notice of motion by Mr. George C. Campbell, seconded by Mr. J. H. Spence, was presented—that the Association deplores the persistence in some parts of the world of the theory that might is right, but anticipates the ultimate triumph of right over might and the inauguration of a reign of law throughout the world by means of the establishment of some form of international tribunal. It was moved by Mr. M. H. Ludwig, seconded by Mr. N. B. Gash, that the motion be referred to Council.

It was moved by Col. W. N. Ponton, seconded by Mr. E. J. Hearn—that, following the example of the Supreme Court Judges of Ontario the Association undertake and endeavour to raise a fund of $1,000 from the Bar of Ontario to provide a machine gun for the use of the Osgoode Hall Rifle Association under the direction of the Department of Militia and Defence of Canada, and to be manned by members of the Law Society of Upper Canada, barristers, solicitors or students-at-law, who may volunteer to serve in the third or any future contingent. The motion was supported by Mr. M. H. Ludwig and W. S. Ormiston and it was resolved that the principle be affirmed and that the matter be referred to the Council.

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It was moved by Mr. H. A. Burbidge, seconded by Mr. F. D. Kerr—that Council be authorized to raise an equal sum ($1,000) for the relief of the Belgians.

It was moved by Mr. M. H. Ludwig, seconded by W. S. Ormiston—that the constitution be amended by increasing the Toronto members of the Council from five to seven.

It was moved by Mr. J. J. Drew, seconded by Mr. J. P. McGregor—that the reports of the Committees on Law Reform, Legislation and Legal History be referred to the Council with the recommendation that they consider the advisability of calling another meeting of the Association to deal with them.

COUNCIL, 1915.

OFFICERS.

Honorary President, SIR GEORGE GIBBONS, K.C., London.

President, W. J. MCWHINNEY, K.C., Toronto.

Vice-Presidents, GEO. C. CAMPBELL, Toronto; A. E. H. CRESWICKE, K.C., Barrie; J. E. FAREWELL, K.C., Whitby.

Recording Secretary, C. F. RITCHIE, Toronto.

Corresponding Secretary, R. J. MACLENNAN, Toronto.

Treasurer, C. A. MOSS, Toronto.

Historian and Archivist, COL. W. N. PONTON, K.C., Belleville.

REPRESENTATIVES.

Past Presidents.—A. H. Clarke, K.C., Calgary; Hon. Mr. Justice Hodgins, Toronto; S. F. Lazier, K.C., Hamilton; Charles Elliott, Toronto; W. C. Mikel, K.C., Belleville; M. H. Ludwig, K.C., Toronto; F. M. Field, K.C., Cobourg.

Toronto Members.—Frank Denton, K.C.; E. J. Hearn, K.C.; N. B. Gash, K.C.; J. H. Spence; James Bain, K.C.; H. H. Dewart, K. C.; J. A. McAndrew.

Other Members.—H. A. Burbidge, Hamilton; R. T. Harding, Stratford; J. J. Drew, K.C., Guelph.

Twelve additional representatives will be elected at the first meeting of the Council.

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TREASURER'S STATEMENT.

29th December, 1913, to 5th January, 1915.

RECEIPTS.

Cash on hand	$ 555 05
Fees received	319 15
Bank error in 1913 allowed	60
Banquet tickets in 1914	468 00
Banquet tickets, 1915	99 00
Refund from County York Law Association	58 39
Bank interest	13 62
	$1,513 81

PAID.

Banquet expenses, 1914	431 50
Printing, stationery, postage	372 92
Travelling expenses (delegates)	136 85
Sundries	17 10
Balance on hand	555 44
	$1,513 81

C. A. Moss,
Treasurer.

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The Library

"And what of this new book?"—*Sterne.*

"Men disparage not antiquity who prudently exalt new enquiries."
— *Sir Thomas Browne.*

LAW QUARTERLY REVIEW.

The Law Quarterly Review has, under the editorship of Sir Frederick Pollock, fully sustained its reputation as the leading legal periodical published in the English language, during the thirty years that have passed since its inception. One special feature which has possessed acknowledged excellence from the very first, has been the "Notes" with which every number commences, upon the most important English decisions of the preceding three months, and such other recent matters as have an interest to lawyers. *Another* equally valuable and excellent *feature* is the short reviews of all recent publications relating to law, whether practical or academic, with which each number closes. In addition, there are in every number five or six articles by able hands, and very often indeed by famous jurists of world-wide reputation, such as Mr. Bryce, lately British Ambassador to Washington, and Regius Professor of Civil Law at Oxford, and Professors Dicey and Holland, and by Superior Court Judges and leading lawyers of England and other countries. The Law Quarterly, therefore, is invaluable to lawyers for practical, as well as intellectual, reasons. Subscribers to the Law Quarterly Review may feel assured that they will miss nothing of importance either in the way of current legal decisions or of current legal discussions and literature.

A. H. F. L.

In order to increase the number of subscribers to the Quarterly for 1915, we are making a special reduction to new subscribers who will take the "Canadian Law Times" and the "Law Quarterly," and the Carswell Co., Ltd., will supply the two at $6.50, instead of $8.50 as at present. We hope that this low price will induce a sufficient response to warrant the co-operation of the publishers of the Law Quarterly Review with ourselves for a continuance of this club rate.

C. Co., Ltd.

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NOTES OF RECENT DECISIONS.

CROWN GRANTS.

RESERVATIONS. In Quebec all grants of public domain made prior to Union Act (1840), are to be read as subject to the limitations, restrictions and reservations conserving the rights of the public as to navigation, and otherwise, contained in the instructions to Lord Dorchester as Governor of Lower Canada. Since the passage of Union Act (1840), grants of public domain in that province have been made under authority of provincial legislature and subject to all statutory restrictions as have been from time to time imposed. *Leamy* v. *R.* (1915), 5 Jan. Ex. C. Can.

EXPROPRIATION.

1 COMPENSATION. *i. Amount and Measure.*

MARKET VALUE of a water-lot is the proper basis for assessment of compensation, but while that value may be enhanced by the hope or expectation of obtaining authority to erect structures on the lot where there is no evidence of market value to guide it the Court will not assess compensation on a hope or expectation which cannot be regarded as a right of property in the defendant. *R.* v. *Wilson* (1914), 7 Dec. Ex C. Can.

MARKET VALUE. On 14th April, 1913, the Crown, represented by Minister of Public Works, registered a plan and description under Expropriation Act for acquisition of certain property in Toronto for Post Office purposes. Five days prior to such registration defendant H., on behalf of certain other defendants, entered into an agreement for the purchase of the property in question for $100,000. The Court found that at date of agreement to purchase neither H. nor the defendants for whom he bought were aware of the intended expropriation by the Crown, although the property had not been previously in demand in the real estate market. *Held,* that the price paid for the property by the defendant H. should be taken at its actual market value for the purposes of compensation, and defendants were not entitled as a matter of right to have 10% added to the market value of the property. *R.* v. *Macpherson* (1914), 17 June, Ex. C. Can.

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MORTGAGE BONUS—Where there is a mortgage upon property in which the mortgagor stipulates for a bonus to be paid him in case the principal is sought to be paid before the mortgage falls due, the Crown expropriating before that event must assume the payment of such bonus in addition to paying the value of the property taken. *R.* v. *Macpherson* (1914), 17 June, Ex. C. Can.

SPECIAL ADAPTABILITY—In assessing compensation for lands expropriated any "special adaptability" which the property may have for some use or purpose is to be treated as an element of market value, and in such cases the Court should apply itself to a consideration of the value as if the scheme in respect of which the compulsory powers are exercised had no existence. *R.* v. *Wilson* (1914), 7 Dec., Ex. C. Can.

ii. Necessity and Sufficiency.

DAMAGE COMMON TO NEIGHBOURHOOD—For the purposes of a projected public work, the Crown expropriated a market place and demolished the buildings thereon in the vicinity of suppliant's property. The Crown had also expropriated the suppliant's property which it subsequently returned to the suppliants.

Held, that suppliants had no right to damages for any depreciation in the value of their property arising from the destruction of the market, as any loss so arising to the suppliants was suffered by them in common with the other property owners in the neighbourhood. *Gibb* v. *R.* (1914), 7 Nov., Ex. C. Can.

INTERFERENCE WITH RIGHT TO LEASE—The damage or loss in respect of which the Court will assess compensation must arise out of some physical interference with property or with some right incidental thereto, different in kind from that which all the properties in the neighbourhood are subject to, and must be of such a nature as would be actionable but for the statute authorizing the work. Hence, where the surrounding properties had been temporarily enhanced in value by reason of a projected Government work subsequently abandoned, the owner of property, no part of which has been taken, has no claim to compensation because of the abandonment by the Government of the proposed scheme. On the other hand where property has been taken and returned all damages arising out of any interference with the owner's

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rights in respect of leasing the lands during the period the expropriation was effective is a proper subject of compensation. *Gibb* v. *R.* (1914), 7 Nov., Ex. C. Can.

3. PRACTICE AND PROCEDURE—*ii. Abandonment of Proceedings.*

EXPROPRIATION ACT, s. 23 (4) gives jurisdiction to the Court over claims arising out of a partial abandonment of the property and it also extends to claims for total abandonment as well. *Gibb* v. *R.* (1914), 7 Nov., Ex. C. Can.

4. REMEDIES OF OWNERS.

PETITION OF RIGHT—Upon expropriation proceedings being taken it is the intention of Expropriation Act, s. 23 (4) that actions be not multiplied, that the damages are to be assessed once for all in such proceedings, but where the Crown before judgment, returns the property to the owner, and discontinues the action, so that damages are prevented from being assessed at all therein, then the owner of the property has a remedy by petition of right under the jurisdiction clauses of Exchequer Court Act, (ss. 19, 20.) *Gibb* v. *R.* (1914), 7 Nov., Ex. C. Can.

PRINCIPAL AND AGENT.

UNREGISTERED BROKER — Suppliant, an unregistered broker, acting under instructions from Collector of Customs at Montreal, obtained a deed of certain property from the owners to the Crown. Before doing so the Collector asked suppliant about his commission. Suppliant replied that 2½% was the regular commission but he would leave that to the collector to settle. *Held,* that the mandate was not gratuitous under Act 1702, C. C. P. Q. and that suppliant was entitled to 1½% commission. *Wright* v. *R.* (1914), 7 Nov. Ex. C. Can.

TRADE MARK.

DESCRIPTION—In applying for a trade mark under the Canadian Statute the applicant must describe in writing what he claims as his mark. A drawing must also be filed. But the claim in the written application cannot be extended by reason of something appearing in the drawing which has not been claimed. *Mickelson Shapiro Co.* v. *Mickelson Drug & Chemical Co.* (1914), 19 Dec., Ex. C. Can.

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GOPHER POISON—Trade-mark for gopher poison, registered in Canadian Trade-mark Register No. 56, folio 13,708, ordered to be expunged. *Mickelson Shapiro Co.* v. *Mickelson Drug & Chemical Co.* (1914), 19 Dec., Ex. C. Can.

PASSING OF GOODS—The Exchequer Court of Canada has jurisdiction to restrain any infringement of a trade-mark but has no jurisdiction to entertain an action seeking damages for passing off goods of the plaintiff as those manufactured and sold by the defendant. *Mickelson Shapiro Co.* v. *Mickelson Drug & Chemical Co.* (1914), 19 Dec. Ex. C. Can.

WATER AND WATERCOURSES.

5. NAVIGABLE WATERS.

BEDS OF ALL NAVIGABLE RIVERS are by law vested *prima facie* in the Crown. But this ownership of the Crown is for the benefit of the subject, and cannot be used in any way so as to derogate from or interfere with such right which belongs by law to the subjects of the Crown. Hence, in a grant of part of the public domain from the Crown to a subject the bed of a navigable river will not pass unless an intention to convey the same is expressed in clear and unambiguous terms in the grant. *Leamy* v. *R.* (1915), 5 Jan., Ex. C. Can.

JUS PUBLICUM—Under the decisions of the Seigneurial Court, constituted under the Seigneurial Act of 1854 together with the provisions of Art. 538 C. N. and of Art. 400 C. C. P. Q., navigable rivers are considered as being dependencies of the Crown domain and as such inalienable and imprescriptable. Hence all grants purporting to create rights in the bed of such rivers must be construed as subject to the exercise of the *jus publicum* at all times. *Leamy* v. *R.* (1915), 5 Jan., Ex. C. Can.

6. RIPARIAN RIGHTS.

WATER-LOT—The owner of a water-lot in a public harbour under a patent from the Crown granted before Confederation cannot place erections thereon without the approval of the Governor in Council as required by ch. 115, part 1, of R. S. 1906. *R.* v. *Wilson* (1914), 7 Dec., Ex. C. Can.

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The Canadian Law Times.

VOL. XXXV. FEBRUARY, 1915. No. 2.

Short notes of cases are a very unappetizing form of literature. Moreover, so far as Ontario cases are concerned, most lawyers have them in the Ontario Weekly Notes. In place, therefore, of serving up before our readers the latest products of the Courts in such an unpalatable form, we propose to offer them a more discursive commentary on English and Canadian decisions, and to make this a standing feature of our periodical. It is but an experiment, and we can easily revert to our former enlarged headnotes if we find our subscribers prefer them.

It is interesting news to many people that the 8th *and final* edition of Dicey's Law of the Constitution, which is to be published by Messrs. Macmillan this month, will contain a new introduction by the author forming a survey of the development of constitutional law in Great Britain during the last thirty years. In this survey the author intends to discuss, among other changes, the effects produced by the Parliament Act 1911, and the difference between the relation of England to the self-governing Colonies in 1884, when the book was first written, and her relation to the four Dominions in 1914. Professor Dicey will also deal with woman suffrage, proportional representation, federalism, and the Referendum, and attempt in each case to give the main arguments which may be advanced in favour, or against, each of these proposed reforms or innovations.

We publish in this number some verses from the pen of Mr. S. V. Blake. The profession is sometimes reproached with the statement that the spirit of law is antipathetic to that of *belles lettres*. The remark is unjust; and though it may be said by critics who are attracted by the verses that

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Privy Council practice is conducted in an atmosphere more propitious to this plant of tender growth than exists in the average law office, we reply that in taking such a position our critics have abandoned the attack, and are now engaged in a respectable retreat. The profession will be glad to welcome Mr. Blake to Canada. '*The Horse-Breeder's Vision*' is taken from a little book entitled "Her Soldier Dead and Other Verse," written by Mr. Blake for the most part since the war, the proceeds of which we are informed are to go to the Red Cross or Belgian Relief funds. The book may be obtained from Messrs. Tyrrell & Co., 95 King St. E., Toronto, or from Mr. Blake at 449 Jarvis St., Toronto. The price is 25 cents.

The CANADIAN LAW TIMES, under its new management, aspires to be preeminently practical, but the hideous and abominable war now waging in Europe, Egypt, and Africa is of absorbing interest to the legal as well as the lay mind. On its outcome the future not only of personal liberty, but of International law is at stake. Therefore, we make no apology for the excellent article on the Dacia case by Mr. Falconbridge, nor for the Appreciation of Monsieur Lapradelle's recent lecture at the University of Toronto on 'International law and the present War.' In this connection also we may mention two of the latest of those "Oxford Pamphlets," which are coming out in rapid succession, and which are worth the small price which they cost many times over. We refer to the two pamphlets of Mr. Pearce Higgins, lecturer at the Royal Naval War College, on the Law of Nations and the War, and Non-Combatants and the War. In the former he shews that there is no true comparison between the conduct of the Germans in regard to Belgium and the seizure of the Danish fleet by the British in 1807. He also shews that the German rule of "necessity," by which they excuse their conduct, is quite contrary to the received principles of National law.

It is not every difficult case, nor is it every knotty problem which calls for the constitution of a full Court of Appeal in England. This unusual, one might almost say historic event, occurred recently when a galaxy of judicial talent consisting of the Lord Chief Justice, the Master of the Rolls

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and Lord Justices Buckley, Kennedy, Swinfen Eady, Phillimore and Pickford assembled to consider and declare the law on the subject of alien enemies. There were four appeals on the list: Port v. Freundenberg, Krelinger v. S. Samuel and Rosenfeld, in re Merten's Patent, and Maxwell v. Grunhut; and the main questions raised were whether an alien enemy owing a debt to a British subject could be sued; whether if he could be sued, he could be brought before the Court and by what means; whether substituted service on a branch in England of an alien firm would be permitted; whether the Court had jurisdiction to hear the appeal of an alien enemy during the war; and whether the Court would appoint the agent of an Austrian subject carrying on business in England as his receiver. On the point last mentioned the Lord Chief Justice in giving the judgment of the Court in the negative said that the principal who was an alien enemy could not bring an action to recover debts due to him, and that the Court would not appoint his agent receiver in order to get in debts due to the principal. The other three cases were argued and the Attorney-General (Sir John Simon) who represented the Crown, urged that the phrase "Alien enemy" did not mean every subject of a State at war with the Crown; it meant a person of whatever nationality who was resident or carrying on business in the enemy's territory; and he submitted generally that (1) A German domiciled in England and carrying on business there is not an alien enemy; (2) A British subject domiciled in Germany and carrying on business there during the war is an alien enemy; (3) The question is determined not by whose subject the trader is but by where he is domiciled. The Court did not dissent from these propositions but reserved judgment. As yet the decision, which the profession throughout the Empire will await with interest, does not appear to have been delivered.

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THE CASE OF THE DACIA.

The steamship Dacia, until lately unknown to fame, has become the subject of discussion in many newspapers, and the decision as to its status may be of great international consequence. The ship formerly belonged to the Hamburg-American line and flew the German flag. Recently it was sold to Edward N. Breitung of Marquette, Michigan, a citizen of the United States, and was registered as an American ship. It then took on a cargo of cotton (which admittedly is non-contraband) at Galveston. The original intention apparently was that the ship should sail direct to Bremen, but it was subsequently announced that the destination would be Rotterdam.

The question of the transfer of ships from the German to the American flag during the present war has been the subject of various communications between the British and the American governments. As reported in the newspapers [1] the British attitude is that no objection will be taken to the sale in good faith of a ship by a German to a neutral trader, if the ship is not used for the purpose of trading with Germany. The Dacia for instance, might sail to South America and would not be molested, but it will not be allowed to sail to Germany, or even to a neutral port, such as Rotterdam, from which its cargo can be shipped to Germany.

So far, however, as the public has been taken into the confidence of the British Government, the official attitude of that Government is embodied in the following statement issued on the 21st of January by the British Embassy in Washington:—

"In connection with the transfer of the Dacia from the German to the American flag, the British Government, while anxious to avoid causing loss to the shippers of the cargo, have found it impossible to agree that the transfer, in the circumstances in which it has been effected, is valid in accordance with the accepted principles of international law. If, therefore, the Dacia should proceed to sea and should be captured, the British Government will find themselves obliged to bring the ship (apart from the cargo) before the prize court. It is stated that the cargo of the Dacia is to consist solely of cotton owned by American citizens. If this is so,

[1] See e.g. the New York Times for 9th of January, and later dates.

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and if the vessel should be captured, the British Government will guarantee either to purchase the cargo at the price which would have been realized by the shippers if the cargo had reached its foreign destination, or, if preferred, they will undertake to forward the cotton to Rotterdam without further expense to the shippers."

Notwithstanding this warning the Dacia sailed from Galveston on the 31st of January.

In view of the practical importance of the subject, I propose briefly to state the general principles hitherto governing the sale of a ship by a belligerent to a neutral trader, and to suggest some special considerations which appear to be applicable to the subject in the circumstances of the present war. It is assumed of course that the transferred ship does not carry contraband and is therefore not subject to capture on that account. It is also to be noted that the discussion is confined to merchant vessels. Admittedly the sale of a war vessel by a belligerent to a neutral *flagrante bello* is invalid.

It is clearly necessary for the validity of the transfer of a ship from a belligerent to a neutral flag that the sale should not be subject to any condition or even tacit understanding by which the vendor keeps an interest in the vessel or its profits, or control over it, or power of revocation, or a right to its restoration at the conclusion of the war. The circumstances attending a sale are severely scrutinized because the opportunities of fraud are great, but subject to such scrutiny, the right of a neutral to purchase vessels from a belligerent has in the past been admitted in principle in Great Britain as well as in the United States.[2]

A leading case on the subject is that of the Ariel.[3] On October 18th, 1854, during the war between Great Britain and Russia, the Ariel, a vessel flying the Danish flag, was seized at Belfast and proceeded against in the Court of Admiralty as being the property of a Russian. It appeared that in the preceding March, when war was imminent, the vessel had been sold by its former Russian owner, Hagedorn, to one Sorensen, son of the Danish consul at Libau in Russia. The Court of Admiralty condemned the vessel as enemy property, but on appeal the decree was reversed, and restitution

[2] Hall, International Law, 6th ed., p. 499.
[3] (1857) 11 Moo. P. C. 119.

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was granted, although without costs or damages. The reasons given by the Privy Council are stated as follows in Cobbett's Cases and Opinions on International Law (vol. 2, pp. 145-146):—

"In the judgment of the Privy Council, which was delivered by the Rt. Hon. Sir John Patteson, the first question considered was that of the national character of the claimant. As to this it was held, notwithstanding certain circumstances of suspicion, that the appellant had fully established his claim to the Danish character. The next and important question was whether the appellant was the owner and sole owner of the Ariel, at the time of capture. This depended on two points: (1) Had there been a genuine and absolute sale of the Ariel by the former Russian owners to the claimant without collusion or fraud? and (2) Did any interest on the ship remain in the seller at the time of capture?

"On the question of the sale, the Court, after a careful examination of the facts, came to the conclusion that it was not only clear that the sale had been made in contemplation of war, but that the Russian shipowners at Libau, feeling that the war was at hand, had determined to sell their vessels at greatly reduced prices to neutrals, rather than keep them unemployed in Russian ports. There was therefore abundant proof that the sale was made *imminente bello*. Nevertheless, if the sale was absolute and *bona fide*, there was no rule of international law, at any rate as interpreted in this country, which made it illegal, even though made either *imminente* or even *flagrante bello*. The Ariel, moreover, was in port at the time of sale, and therefore the cases as to the illegality of sales of vessels *in transitu* did not apply. Was the sale, then, absolute and *bona fide*? Undoubtedly, both the time at which the sale took place, the fact that the claimant had made himself a neutral for the express purpose of buying this and other ships, and his inability to pay the whole price, all tended to throw suspicion on it, and made it incumbent on the Court to look closely into the history of the transaction. And if there had been facts leading to a well-founded conclusion that the ship was to be restored to the seller in the event of no war breaking out or in the event of a speedy peace; or that the ship was to be employed by the claimant under the direction and for the benefit of the seller, then the Court would have been bound to hold the sale collusive and void, and to condemn the ship as enemy property. But on

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review of the circumstances it did not appear that there was any evidence leading to either of these conclusions. Part of the purchase-money had been paid in cash and the postponement of the remaining payments was sufficiently accounted for; security had subsequently been given in the shape of certain acceptances, and a proviso that the earnings of the vessel should be applied in discharge of these had been duly carried out, with the result that only a small sum remained due at the time of capture. After the sale the vessel had passed under the sole control of the purchaser, and had not continued exclusively in the Russian trade. For these reasons it had been held in the Court below that the sale was *bona fide*, in the sense that it was real and intended to pass the property in the ship, without any engagement to restore it under any circumstances, and without fraud or collusion. And in this opinion the Judicial Committee fully concurred.

"As to the second question—whether any interest in the ship remained in the seller, by reason of the balance of the purchase money remaining unpaid, it appeared on a review of the cases that this fact alone did not create a lien on the freight and ship in favour of the seller, so as to render the ship when in the possession of a neutral owner liable to seizure by a belligerent. In the present case, however, there was also an engagement to pay out of earnings; and this, it was said, created an interest in and a lien on the freight, and through the freight on the ship. But even if the vendor had a lien on the freight, it would not follow that he had a lien on the ship, for these interests were quite distinct. Nor, indeed, even if it could have been shewn that there was a lien either on freight or ship, would it have followed that such a lien would render the vessel, when in the possession of a neutral owner, liable to capture. Such liens, whether in favour of a neutral on an enemy's ship, or in favour of an enemy on a neutral's ship, were equally to be disregarded in a Court of Prize. In effect the whole case resolved itself into a question of *bona fides;* and that having been established the Court felt bound to conclude that the Ariel was the property of the claimants alone, and that no interest remained in the seller."

It will be observed that the sale of the Ariel took place before the actual outbreak of war, but as it was found by the Court that the sale was made in contemplation of war, and therefore for the purpose of evading the consequences

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of war, the presumption of validity was rebutted, and the case was decided on the same principles as would have been applicable to a sale made after the outbreak of war.

We may assume that the British Government is not acting in matters of this kind without consulting the French Government, and in any case a ship transferred from the German flag may happen to be captured, not by a British, but by a French ship. It is, therefore, material to note that the French doctrine (agreeing in this respect with the Russian and the German doctrine) in regard to the sale of vessels by a belligerent has in the past been much less favourable to the validity of the sale than the British and the American doctrine.

The subject is dealt with by Articles 55 and 56 of the Declaration of London, 1909, the former Article relating to transfers made before, the latter to transfers made after, the outbreak of war. Article 56 is as follows:—

"The transfer of an enemy vessel to a neutral flag, effected after the outbreak of hostilities, is void unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed. There is, however, an absolute presumption that a transfer is void:—(1) If the transfer has been made during a voyage or in a blockaded port; (2) If a right to repurchase or recover the vessel is reserved to the vendor; (3) If the requirements of the municipal law governing the right to fly the flag under which the vessel is sailing, have not been fulfilled."

In the learned report (prepared by Monsieur Renault) of the drafting committee of the London Conference, 1908-9, it is said in regard to Article 56:—

"The rule respecting transfers made after the outbreak of hostilities is more simple. Such a transfer is only valid if it is proved that its object was not to evade the consequences to which an enemy vessel, as such, is exposed. The rule accepted in respect of transfers made before the outbreak of hostilities is inverted. In that case there is a presumption that the transfer is valid; in the present, that it is void—provided always that proof to the contrary may be given. For instance it might be proved that the transfer had taken place by inheritance.

"Article 56 recites cases in which the presumption that the transfer is void is absolute, for reasons which can be readily understood. In the first case the connection between

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the transfer and the war risk run by the vessel is evident. In the second, the transferee is a mere man of straw, who is to be treated as owner during a dangerous period, after which the vendor will recover possession of his vessel. Lastly, the third case might strictly be regarded as already provided for, since a vessel which lays claim to neutral nationality must naturally prove that she has a right to it."

In reading Article 56, it is difficult to avoid the conclusion that the doctrine there stated is less favourable to the validity of a sale than the rule hitherto upheld in the British and American Prize Courts, and this view of the Article seems to be supported by the opinion of the majority of English writers on the subject. If the article is read according to the natural meaning of its wording, it renders void a transfer which is made to avoid the ship's having to lie idle either in a neutral port or in a national port, or having to put to sea at the risk of being captured. In other words it would render void the transfer of the Dacia, whether or not the sale is in good faith. This view of the meaning of the article is also supported by the fact that in the report of the drafting committee above quoted from, the only example given by Monsieur Renault of a case not within the article is that of a transfer by inheritance.

The Declaration of London is, however, not law in the present war, because it has not been ratified by the belligerent nations. It is true that the British Government has declared its intention of adhering to the Declaration subject to certain modifications, but the United States Government has already [1] stated that in view of the failure of the belligerents to ratify the Declaration *in toto* it will, in any controversy that may arise in regard to any question dealt with in the Declaration, rely upon its rights under international law as interpreted by traditional American policy prior to the signing of the Declaration.

In an interesting article in the New York Times for October 4th, 1914, by Carman F. Randolph, it is suggested that the whole subject is shifted to a new plane by present conditions. In past wars change of flag during war has been generally viewed as connoting a seller's necessity rather than a buyer's opportunity. Hence the concern even of the

[1] In its answer to the German memorandum complaining of the alleged breach by Great Britain of the rules of international law in regard to contraband and other matters covered by the Declaration of London. New York Times, November 24th, 1914.

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American Courts lest transfer to a neutral flag be a seller's trick. In the present war, however, to an unprecedented degree, the sales of belligerent ships, if they are recognized as valid, will afford to the citizens of a great neutral nation an opportunity to supplement their inadequate merchant marine for the purpose of carrying on their enormous foreign trade. In other words there will be many sales which beyond all doubt will be honest and absolute, and which will therefore be valid if good faith is the sole test.

On the other hand it may be pointed out that the object of such sales in the present circumstances will usually be to enable American traders to export goods to Germany, and the result, if the sales are recognized as valid, will be to enable the ships under another flag to sail in safety over their old routes carrying merchandise to the fellow subjects of their old masters. In substance the result would be such a plain evasion of the consequences of a state of war as to suggest the inadequacy of the old test of the validity of the transactions, that is to say, the fact that a ship after the sale is to be used in the very trade from which as a belligerent ship it would be debarred ought not merely to be taken into consideration in deciding as to the *bona fides* of the sale, but perhaps ought to be an invalidating element even if the sale is an absolute one to a neutral who is acting in the utmost good faith in the sense that he is thinking only of his own interest and is not in any sense in collusion with the vendor.

The particular phase of the subject just discussed may of course not arise in the case of the Dacia. It has been suggested that there are suspicious circumstances about the transaction. These will, if the ship is captured, be investigated by the Prize Court, and it may be found that the sale was a collusive one, and that the vessel should be condemned without reference to the particular trade in which it is intended to use it.

It is, however, interesting to note that at the London Naval Conference it was at one time proposed to make provision in Article 56 of the Declaration of London for the case of a vessel which is retained after the transfer in the trade in which she was previously engaged. In the report of the drafting committee already referred to, Monsieur Renault wrote:—

"Such a circumstance is in the highest degree suspicious: the transfer has a fictitious appearance, inasmuch as nothing

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has changed in regard to the vessel's trade. This would apply, for instance, if a vessel were running on the same line before and after the transfer. It was, however, objected that to set up an absolute presumption would sometimes be too severe, and that certain kinds of vessels, as, for example, tank ships, could, on account of their build, engage only in a certain definite trade. To meet this objection the word 'route' was then added, so that it would have been necessary that the vessel should be engaged in the same trade and on the same route; it was thought that in this way the above contention would have been satisfactorily met. However, the suppression of this case from the list being insisted on, it was agreed to eliminate it. Consequently, a transfer of this character now falls within the general rule; it is certainly presumed to be void, but the presumption may be rebutted."

In conclusion reference should be made to the German official attitude towards the hypothetical case of a British ship transferred from the British flag to the American flag since the outbreak of war and then engaging in direct trade between the United States and Germany. The German Foreign Office is reported [5] to have made to the American Ambassador in Berlin a statement substantially as follows:—

"Referring to Article 56 of the London Naval Conference it may be stated that the transfer to the American flag of a British vessel after war has been started is not valid *per se*; but the German Government, reserving the right at any time to withdraw its consent, is ready, where such ships are engaged only in direct trade between American and German ports and carrying American goods into German ports, and returning German materials consigned to and for use only in the United States, to waive the invalidity of such transfer. The Foreign Office further states it to be expedient that an official statement that such a vessel is destined by a direct route to a German port, there to unload and return directly with German products consigned to and for use only in the United States, be prepared by the proper American officer, each ship also to have for each round trip a safe conduct by the Imperial German Ambassador in the United States, based upon the official statement just mentioned, which requests German war vessels to permit an unmolested journey."

JOHN DELATRE FALCONBRIDGE.

[5] New York Times, 12 Jan. 1915.

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THE JOHN DEERE PLOW COMPANY CASE.

BY THE EDITOR.

The decision of the Privy Council in this case is of much interest and importance for two reasons. It vindicates the objection which Ministers of Justice have constantly taken to provincial Acts imposing the necessity upon companies incorporated by Dominion charter of taking out a provincial license before doing business in the province; and it throws some new light, at last upon the scope of the Dominion power to make laws for the peace, order and good government of Canada in relation to the regulation of trade and commerce. The publication of the *verbatim* report of the argument, read in connection with the judgment, should enable us to estimate accurately the full purport of their lordships' decision.

In order to do this the best plan would seem to be to set out first the objects and powers of the John Deere Plow Company as stated in their charter, and then the relevant Dominion and provincial enactments referred to in the judgment. We shall thus see what was the question before the Board, and upon what they have made their judicial pronouncement.

The John Deere Plow Company was incorporated in 1907 by letters patent issued by the Secretary of State for Canada under the Dominion Companies Act, R. S. C. 1906, c. 79, with all the rights and powers given by the said Act and for the following purposes and objects, as set out in the charter namely:—'To carry on the business of dealers in agricultural implements, carriages, wagons, and machinery, and a general agency, commission and mercantile business, and to acquire, buy, sell, mortgage, exchange, improve and dispose of all kinds of real and personal property, rights, and patents. The operations of the Company to be carried on throughout the Dominion of Canada and elsewhere.'

By section 5 of the Dominion Companies Act the Secretary of State may, by letters patent, grant a charter to any number of persons, not less than five, who apply therefor, constituting such persons, and others who have become subscribers to a memorandum of agreement a body corporate and politic for any of the purposes or objects to which the

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legislative authority of the parliament of Canada extends, with certain exceptions not affecting the present case; and the Dominion Interpretation Act by section 30 provides, among other things, that words making any association or number of persons a corporation shall vest in such corporation power to sue and be sued, to contract by their corporate name, and to acquire and hold personal property for the purposes for which the corporation was created.

Certain other provisions are expressly referred to the judgment which it is right to mention here, because they explain and illustrate the import of their lordships' language, presently to be set out, as to the scope and interpretation of the Dominion power over the regulation of trade and commerce. They are as follows: section 10 of the Dominion Companies Act makes it a condition of the issue of the letters patent that the applicants shall satisfy the Secretary of State that the proposed name of the Company is not the name of any other known incorporated or unincorporated company, or one likely to be confounded with any such name; and section 12 gives him large powers of interpretation as regards the corporate name; section 29 provides that on incorporation the company is to be vested with, among other things, all the powers, privileges, and immunities requisite or incidental to the carrying on of its undertaking as if it were incorporated by Act of parliament; section 30 enacts that the company shall have an office in the city or town in which its chief place of business in Canada is situate, which shall be the legal domicile of the company in Canada, and that the company may establish such other offices and agencies elsewhere as it deems expedient; and section 32 provides that the contract of an agent of the company made within his authority is to be binding on the company, and that no person acting as such agent shall be thereby subjected to individual liability.

On the other hand the British Columbia Companies Act contains certain provisions which are thus summarised by their lordships: that an extra-provincial company means any duly incorporated company other than a company incorporated under the laws of the province or the former colonies of British Columbia and Vancouver Island (sec. 2); that every such extra-provincial company having gain for its object must be licensed or registered under the law of the province, and no agent is to carry on its business until

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this has been done (sec. 139); that such license or registration enables it to sue and to hold land in the province (sec. 141); that an extra-provincial company, if duly incorporated by the laws of, among other authorities, the Dominion, and if duly authorised by its charter and regulations to carry out or effect any of the purposes or objects to which the legislative authority of the provincial legislature extends, may obtain from the provincial Registrar of Joint Stock companies a license to carry on business within the province on complying with the provisions of the Act and paying the proper fees (sec. 152); that if such a company carries on business without a license it is liable to penalties (sec. 167); that the agents who act for it are similarly liable; and the company cannot sue in the Courts of the province in respect of contracts made within the provinces (sec. 168); and that 'an extra-provincial company may not be licensed or registered by a name identical with that by which a company or society or firm in existence is carrying on business or has been incorporated, licensed, or registered, or so nearly resembling that name as in the opinion of the Registrar to be calculated to deceive, or by a name of which the Registrar shall for any other reason disapprove' (sec. 18).

The John Deere Plow company applied to the Registrar of companies in British Columbia for registration and a license under the above provisions, and the Registrar rejected their application because—"the John Deere Plow company of Illinois has already been registered in this province, and, I am unable in view of the provisions of the Companies Act to register your company with the same name."

Their lordships, however, hold that the above provisions of the British Columbia Companies Act purporting to compel such a Dominion company as the John Deere Plow company to obtain a provincial license or to be registered in the province as a condition of exercising its powers within the province or of suing in the provincial Courts are *ultra vires* of the provincial legislature, and therefore inoperative for these purposes.

Now it is well to notice, in the first place, that in so holding the Board in no way impugn any of its previous decisions. They affirm the decision in Citizens Insurance Co. v. Parsons (1881), 7 App. Cas. 96, that the incorporation of such a company as the John Deere Plow company for objects other than provincial belongs to the Dominion parliament

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by its general power over all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces; and therefore, in their view of the matter, it became unnecessary for them to pass upon, and they do not pass upon, the contention again vigorously raised by Mr. Newcombe as counsel for the Attorney-General for Canada, any more than it was necessary to do so in Citizens Insurance Co. v. Parsons, that the Dominion can claim such power of incorporation under the enumerated head No. 2 of section 91, 'regulation of trade and commerce'; nor did they pass upon the other contention, which Mr. Newcombe left to his junior to propound, that although the enterprise of such a company as the John Deere Plow company could not be said to be 'a work and undertaking connecting the province with any other or others of the provinces,' yet that it was 'a work and undertaking extending beyond the limits of the province,' inasmuch as it contemplated trade throughout the Dominion, and inasmuch as the charter included the power to acquire real property, and such real property might be partly in one province, and partly in another; and that, therefore, the incorporation of the company fell under enumerated power No. 29 of section 91.

Their lordships say, in a passage which perhaps adds something to, and certainly detracts in no way from, the solution to be found in previous decisions of that *crux* in the distribution of the legislative power under the British North America Act,—the proper scope and interpretation of the exclusive provincial power over 'property and civil rights in the province':—

"Turning to the appeal before them the first observation which their lordships desire to make is that the power of the provincial legislature to make laws in relation to matters coming within the class of subjects forming No. 11 of section 92, the incorporation of companies with provincial objects, cannot extend to a company such as the appellant company, the objects of which are not provincial. Nor is this defect of power aided by the power given by No. 13 'property and civil rights.' Unless these two heads are read disjunctively the limitation in No. 11 would be nugatory. The expression 'civil rights in the province' is a very wide one, extending if interpreted literally, to much of the field of the other heads of section 92, and also to much of the field of section 91. But the expression cannot be so

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interpreted, and it must be regarded as excluding cases expressly dealt with elsewhere in the two sections, notwithstanding the generality of the words. If this be so, then the power of legislating with reference to the incorporation of companies with other than provincial objects must belong exclusively to the Dominion parliament, for the matter is one 'not coming within the classes of subjects assigned exclusively to the legislatures of the provinces,' within the meaning of the initial words of section 91, and may be properly regarded as a matter affecting the Dominion generally and covered by the expression 'the peace, order, and good government of Canada.'"

Again their lordships' judgment expressly declares itself to be "in full harmony with" the judgments of the Board in Citizens Insurance Company v. Parsons, *supra,* and in Colonial Building Association v. Attorney-General of Quebec (1883), 9 App. Cas. 157, in which two cases it will be remembered their lordships laid it down that it by no means follows that because the Dominion parliament has, under its general residuary power, alone the right to create a corporation such as an insurance company to carry on business throughout the Dominion, it alone has the right to regulate its contracts in each of the provinces; and that, although the Dominion in like manner can incorporate a company with power to deal in lands and buildings, yet the capacity so given only enables such a company to acquire and hold land in any province consistently with the laws of that province relating to the acquisition and tenure of land, such, for example, as the law of mortmain.

So too the judgment expressly declares itself in harmony with Bank of Toronto v. Lambe (1887), 12 App. Cas. 575, where it was laid down that the provincial legislatures have power to impose direct taxes on banks, in spite of the fact that they might lay on taxes so heavy as to crush a bank out of existence, and so nullify the exclusive power of the Dominion parliament to erect banks under its exclusive legislative authority over banking and the incorporation of banks given by No. 15 of section 91. And their lordships quite admit as appears from a passage in their judgment quoted later on in this article, what may be deduced from words used by the Board in Russell v. The Queen (1882), 9 App. Cas. 829, and in the Fisheries Case, [1898] A. C. 700, that such provincial taxation may be by way of license, even though such license

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may not be *ejusdem generis* with the licenses mentioned in No. 9 of section 92. It was not pretended that the license which the John Deere Plow company was required to take out by the British Columbia Companies Act before operating in that province was imposed with any view of taxing.

Lastly, their lordships state that they find themselves in agreement with the interpretation put by the Judicial Committee in Citizens Insurance Company v. Parsons, *supra*, on No. 2 of section 91, which confers exclusive power on the Dominion parliament to make laws regulating trade and commerce. And this brings us to the essential factor in their present judgment, namely, that they have further defined the meaning of this Dominion power beyond the definition of it to be extracted from any previous decision.

In fact no decision of the Board, or of our own Courts, can really be said to have heretofore carried the interpretation of the Dominion power over the regulation of trade and commerce beyond the point in which their lordships, while expressly abstaining from any attempt to define the limits of it, left it in Citizens Insurance Company v. Parsons, when they said there that it includes:—

"Political arrangements with regard to trade requiring the sanction of Parliament, regulation of trade in matters of interprovincial concern, and may perhaps include general regulations of trade affecting the whole Dominion, but does not comprehend the power to regulate by legislation the contracts of a particular business or trade (such as the business of fire insurance) in a single province."

Their lordships in their present judgment say:—

"Their lordships think that the power to regulate trade and commerce at all events enables the parliament of Canada to prescribe to what extent the powers of companies the objects of which extend to the entire Dominion should be exercisable, and what limitations should be placed on such powers. For if it be established that the Dominion parliament can create such companies, then it becomes a question of general interest throughout the Dominion in what fashion they should be permitted to trade. Their lordships are therefore of opinion that the parliament of Canada had power to enact the sections relied on in this case in the Dominion Companies Act, and the Interpretation Act. They do not desire to be understood as suggesting, that because the

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status of the Dominion company enables it to trade in a province and thereby confers on it civil rights to some extent, the power to regulate trade and commerce can be exercised in such a way as to trench in the case of such companies, on the exclusive jurisdiction of the provincial legislatures over civil rights in general. No doubt this jurisdiction would conflict with that of the province if civil rights were to be read as an expression of unlimited scope. But, as has already been pointed out, the expression must be construed consistently with various powers conferred by sections 91 and 92, which restrict its literal scope. It is enough for present purposes to say that the province cannot legislate so as to deprive a Dominion company of its status and powers. This does not mean that these powers can be exercised in contravention of the laws of the province restricting the rights of the public in the province generally. What it does mean is that the status and powers of a Dominion company as such cannot be destroyed by provincial legislation. This conclusion appears to their lordships to be in full harmony with what was laid down by the Board in Citizens Insurance Company v. Parsons (1881), 7 App. Cas. 96, Colonial Building Association v. Attorney-General for Quebec (1883), 9 App. Cas. 157, and Bank of Toronto v. Lambe (1887), 12 App. Cas. 575."

This passage is decisive authority for two propositions:—

(1) It is within the scope of the Dominion exclusive legislative power in respect to 'the regulation of trade and commerce' to authorise all companies duly incorporated by it under its residuary powers, and *a fortiori* all companies incorporated under its enumerated powers, to carry on their business throughout Canada, and to give such companies power to sue and be sued, and to contract by their corporate name, and to acquire and hold personal property for the purposes for which they were created, and to exempt individual members of the corporation from personal liability for its debts, obligations, or acts if they do not violate the provisions of the Act incorporating them (these things being what is enacted in the sections of the Dominion Companies Act and the Interpretation Act relied on by the John Deere Plow Company); but—

(2) Such powers in the case of Dominion companies incorporated, as the John Deere Plow company was, under the residuary and not under any of the enumerated Dominion powers, cannot be exercised in contravention of the

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laws of the province restricting the rights of the public in the province generally. On the other hand—

(3) The status and powers of a Dominion company as such cannot be destroyed by provincial legislation.

The second and third of these propositions, however, call for some further explanation. The passage which immediately follows the last one quoted from the judgment throws further light on both:—

"It follows from these premises that these provisions of the Companies Act of British Columbia which are relied on in the present case as compelling the appellant company to obtain a provincial license of the kind about which the controversy has arisen, or to be registered in the province as a condition of exercising its powers and of suing in the Courts, are inoperative for these purposes. The question is not one of enactment of laws affecting the general public in the province and relating to civil rights, or taxation, or the administration of justice. It is in reality whether the province can interfere with the status and corporate capacity of a Dominion company in so far as that status and capacity carries with it powers conferred by the parliament of Canada to carry on business in every part of Canada. Their lordships are of opinion that this question must be answered in the negative."

Here then we have a guide to the proper import of the very broad words in the passage first quoted—that the "Province cannot legislate so as to deprive a Dominion company of its status and power." Their lordships do not discuss the word "status" in their judgment. Brett, L.J., however, in Niboyet v. Niboyet (1875), 4 P. D. at p. 11, supplies us with a definition when he says:—"The status of an individual used as a legal term means the legal position of the individual in or with regard to the rest of the community." We get more help from the last passage quoted from their lordships' judgment which shews that all they mean is that the province cannot interfere with the status and corporate capacity of a Dominion Company *in so far as that status and capacity carries with it powers conferred by the parliament of Canada to carry on business in every part of the Dominion;* and, further, that the province does so interfere with the status and corporate capacity of a Dominion company if it assumes to compel such a company to obtain a provincial license of the

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kind required in the provisions we have quoted from the British Columbia Companies Act, or if it assumes to require it to be registered in the province as a condition of exercising its powers, or of suing in the Courts.

On the other hand, we get more precise light as to the nature of those "laws affecting the general public in the province" to which such Dominion companies as the John Deere Plow company,—that is, such Dominion companies as are incorporated under the residuary and not under any enumerated Dominion power—are subject, in the concluding part of the judgment where their lordships say:—

"It is true that even when a company has been incorporated by the Dominion Government with powers to trade, it is not the less subject to provincial laws of general application enacted under the powers conferred by section 92. Thus, notwithstanding that a Dominion Company has capacity to hold land it cannot refuse to obey the statutes of the province as to mortmain, or escape the payment of taxes, even though they may assume the form of requiring, as a method of raising a revenue, a license to trade which affects a Dominion company in common with other companies. Again such a company is subject to the powers of the province relating to property and civil rights under section 92 for the regulation of contracts generally. To attempt to define *a priori* the full extent to which Dominion companies may be restrained in the exercise of their powers by the operation of this principle is a task which their lordships do not attempt. . . . It might have been competent to the provincial legislature to pass laws applying to companies without distinction, and requiring those that were not incorporated within the province to register for certain limited purposes, such as the furnishing of information. It might also have been competent to enact that any company which had not an office and assets within the province should, under a statute of general application regarding procedure give security for costs. But their lordships think that the provisions in question must be taken to be of quite a different character, and to have been directed to interfering with the status of Dominion companies, and to preventing them from exercising the powers conferred on them by the parliament of Canada dealing with a matter which was not entrusted under section 92 to the provincial legislature. The analogy of the decision of this Board in

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Union Colliery Company v. Bryden, [1899] A. C. 580, therefore, applied. They are unable to place the limited construction upon the word 'incorporation' occurring in that section which was contended for by the respondents and by the learned Counsel who argued the case for the province. They think that the legislation in question really strikes at capacities which are the natural and logical consequences of the incorporation by the Dominion Government of companies with other than provincial objects."

With regard to the reference in this passage to Union Colliery Co. v. Bryden, [1899] A. C. 580, the meaning of their lordships appears to be, that just as in that case provisions of the British Columbia Coal Mines Regulation Act 1890 were held to be *ultra vires* because they had no application except to Chinamen who were aliens or naturalised subjects, and established no rule or regulation except that these aliens or naturalised subjects should not work, or be allowed to work, in underground coal mines within the province, and so trenched upon the exclusive authority of the parliament of Canada over 'naturalization and aliens,'—so in the present case the British Columbia legislation was not legislation with regard to companies generally but were directed, as stated, against the status of Dominion companies in particular, and so trenched upon the exclusive authority of the parliament of Canada over 'the regulation of trade and commerce' as explained in the judgment.

The concluding reference is to a contention raised on behalf of the Attorney-General for British Columbia, as to the effect of the incorporation of such a company as the John Deere Plow Company by the Dominion parliament, and the words "occurring in that section" are to be explained, it would seem, by the wording of No. 11 of section 92 of the British North America Act—'the *incorporation* of Companies with provincial objects.' What the contention was appears from the following extract from the *verbatim* report of the argument:—

Sir Robert Finlay. "I submit to your lordships that the effect of incorporation is to put the corporation so created in the same position as if it were a natural person, to make it *intra vires* of that corporation to do certain things, but, as regards the right to carry on business in a particular province, as regards the conditions on which it should be carried on, all that rests absolutely with the provincial government."

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And again, the same contention was advanced by his junior, Mr. Geoffrey Lawrence, in a passage in the argument worth quoting because it also alludes to a striking argument, raised by that gentleman, on which space will not permit us to dwell, that, after all, the British Columbia legislation in question was merely a part of the 'passing-off' law of the province. In the passage referred to Mr. Lawrence says:—

"The power of the Dominion under the general words of section 91 is to set up artificial persons, and when those artificial persons are set up they are just as much subject to the legislative authority of the province as natural persons are; and I submit that it is clear that natural persons could be prevented from carrying on business in the province, and that they are subject to what is really the passing-off law of the province."

Apart from the question of the measure of control which provincial legislation can exercise over Dominion companies incorporated under the residuary Dominion power of legislation, as distinguished from companies incorporated under the enumerated powers, the interest of the judgment of the Board in this John Deere Plow Company case centres in the interpretation their lordships have given to the exclusive Dominion power over the regulation of trade and commerce. It includes they say power "to prescribe to what extent the powers of companies the objects of which extend to the entire Dominion shall be exercisable, and what limitations should be placed on such powers;" nevertheless this "does not mean that these powers can be exercised in contravention of the laws of the province restricting the rights of the public in the province generally."

But it must be remembered that a Dominion company incorporated under the Dominion residuary power, and not under one of the enumerated powers, is a juristic or artificial person with a congenital infirmity from birth, because the Dominion residuary power only extends, in the words of section 91, to 'matters not coming within the Classes of subjects by this Act assigned exclusively to the legislatures of the provinces.' Therefore it is that, although provincial legislation cannot interfere with the status of such Dominion companies, in the sense explained above, yet such Dominion companies can only operate subject to the general law of the province. But what about individuals? If the Dominion

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exclusive power over the regulation of trade and commerce extends to prescribing to what extent the powers of such companies shall be exercisable, and what limitations should be placed on such powers, it must, it would appear extend also to prescribing to what extent individuals may exercise the power of trading throughout the Dominion and what limitations shall be placed on such powers. And if this is so, it is an exclusive Dominion power, and must take effect in spite of any provincial legislation. We cannot pursue this line of speculation but it seems to lead to fresh fields and pastures new for legislators and lawyers. The fact is the John Deere Plow Company judgment is one upon which a book might be written, and our only fear is that our readers will say that the length of this article proves it.

A. H. F. LEFROY.

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M. DE LAPRADELLE AT THE UNIVERSITY OF TORONTO.

"Are Rheims and Louvain the only ruins?" Thus M. de Lapradelle commenced what we can only describe as a very brilliant lecture on *La grande guerre et le droit international* before an audience which filled the ampitheatre of the Physics Building, University of Toronto, the afternoon of January 16th, 1915. To those who had attended lectures at *L'Ecole de Droit* in Paris and there listened to Professeur de Lapradelle, or M. Renaud, or others of that renowned faculty, which draws students in hundreds from Russia, the Balkans, Spain, Quebec and South America, the occasion was a renewal of happy and inspiring days. With fine poise and a choice of language which made the audience congratulate itself, the lecturer proceeded to analyze the causes and effects of that conflict which to-day is shaking Europe and the world. General issues were first touched, the reasons of State which prompted Germany acting through Austria to force the issue, then Germany's refusal to make use of the machinery which the Peace Conference had provided against a sudden conflagration; next her violation of certain general rules of the Hague Conventions; and finally, after war had been forced, the many instances of breaches by officers in the field and individual soldiers of the rules laid down for the conduct of war. As instance was added to instance and fact multiplied upon fact so did the wave of the speaker's denunciation grow till it broke in fine scorn. Not often was the note permitted, but each time words so fitted the restrained gesture, sentiment so matched the rebuke that the audience thrilled and did not stint its applause.

Premising that in his lecture he would take a detached point of view and consider the war in its juristic effect, M. de Lapradelle said at once that the material destruction wrought in Belgium and France was not what most was to be lamented. In a few words he sketched the plight of Louvain; her buildings a heap of stones, her manuscripts charred cinder, her priceless artistic treasures scattered. But those who know her soul, the spirit of her past and present, the scholarship for which she stands, are aware that Louvain has not been destroyed. And what of Rheims, that majestic pile twice sacred in history and religion? There remains but a

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disfigured shell of the most beautiful cathedral of France, if not the world, her towers wrecked, her altar desecrated, the glory of her many coloured glass blotted out forever. But that spiritual life of which the cathedral was a symbol and a beautiful flower, has not been touched by German shells, but lives and will endure. How different on the other hand is the fate of that great building, the product of an unprecedented movement among the nations, to whose adornment well nigh all the Governments of the world from Europe to America and Asia and the isles of the sea sent expensive gifts, the Palace of Peace at the Hague! This great Hall wherein have met plenipotentiaries from the mightiest and the smallest of the peoples of our planet remains intact. Not a tapestry, not a stone has been touched by German gun or Prussian torch; it is as when the representatives of Germany and Austria-Hungary, France and Russia, Servia and Japan, Belgium and Great Britain put their seals to the Final Act of the Second International Peace Conference, June 30th, 1908. And yet it stands a hollow sham; for that which it represented, the labour of years, the spirit of a new era has been stricken to the earth and lies wounded, perhaps unto death.

Whose is the responsibility for this catastrophe greater far with ill for mankind than the destruction of all the cities of Belgium and Northern France? The pretext is to be found in incidents in Southern Europe. A dastardly crime was committed at Sarajevo when the Crown Prince of Austria and his admired Consort were shot down in the street. The world condemned the criminals. Austria commenced a secret investigation and announced that certain minor Serbian officials had been privy to if not participants in the plot. It was expected that Serbia would be asked to punish all those proved guilty and that she would consent. But Austria was not content with this. She prepared an ultimatum of a severity without precedent in the history of diplomacy, and suddenly presented it to Serbia. The document demanded that a Serbian chauvinistic society, the Narodna Odbrana, should be dissolved; that the Serbian Royal Government should publish on the front page of their Official Journal and in the Official Bulletin to the Army a condemnation of all propaganda the "general tendency of which" was to detach from the Austro-Hungarian Monarchy territories belonging to it; to change the teaching in the public schools;

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to remove from military service and from the administration generally all officers *whom Austria-Hungary should name*: and to permit Austria-Hungary to send representatives to Serbia to suppress movements directed against the territorial integrity of the Monarchy. The ultimatum contained terms incompatible with Serbia's independence. Why did Austria embody in the text of her demands terms going far beyond the punishment of the criminals and the suppression of dangerous propaganda? Because she had determined upon war. The crime furnished the excuse; the motive was the desire to upset the balance of power in the Balkans, to humble Serbia, and drag her from the Russian to the Germanic camp. Then the road would lie open to Salonika and the Mediterranean. German diplomats stated that their country had not been informed of the terms of the Austrian note. The note so obviously involved war with Serbia and risked war with Russia that their statements are not to be believed. Germany was behind Austria. Only forty-eight hours were allowed for a reply. Austria did not expect nor did she want an affirmative answer. Nevertheless on the advice of Russia, sincerely desirous of peace, these unheard of demands were accepted. Serbia consented to suppress the Narodna Odbrana, though Austria had furnished no proof that any of its individuals had committed any criminal act; to publish the condemnation demanded; and to change in the teaching of the public schools anything Austria should object to. A qualified acceptance was given to only two out of the ten formal demands. Serbia promised that such persons as were found guilty after judicial enquiry would be removed from military service; and that she would permit such collaboration by Austrian agents on her territory as was consistent with the principles of international law. Her abasement was complete. Austria could hardly ask for more. Nevertheless the answer was declared unsatisfactory and the Austro-Hungarian Ambassador left Belgrade. Meantime Sir Edward Grey with that promptitude which characterises the true statesman, had proposed mediation by the four powers of Germany, Italy, France, and Great Britain. Neither this nor any other of Sir Edward Grey's proposals met with support at Berlin, from which direction alone real pressure could be brought to bear on Austria; and on July 28th Austria declared war on Serbia. Russia, however, was working earnestly for peace.

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and by the 1st of August Austria had conceded the main point by agreeing to submit to mediation those demands in the note which seemed incompatible with Serbian independence. In the words of Sir Maurice de Bunsen "Austria, in fact, had finally yielded." But Germany had intervened on the 31st July by means of her double ultimatums to St. Petersburg and Paris. They were of such a kind that there was but one answer possible, and Germany declared war on Russia and France. A few days' delay might have saved Europe from one of the greatest calamities in history; but that delay was not accorded. Why all this mad haste? Germany was forcing the pace.

The attitude of France all this time had been scrupulously correct. To avoid giving any pretext of provocation she had withdrawn her soldiers, in spite of protests from the inhabitants of the border districts, to a distance of 10 kilometres from the frontier. It was not until the third of August that Germany declared war on France; but before that date, while the countries were at peace, German troops had three times crossed the frontier and penetrated French territory.

Meanwhile Germany in defiance of all treaties and of her pledged word proposed to Belgium, a neutral State, a shameful bargain, the bartering of her neutrality. This proposed repudiation of international conventions was made not secretly, but openly, brazenly in the light of day. Thus another and a deliberate stroke was aimed at that spiritual conception of which the Peace Palace stands as a melancholy memorial. Belgium refused to sell her neutrality or to repudiate her pledge and Germany tore up the treaty. In expressing his contempt for this scrap of paper which he had thus repudiated the German Chancellor forgot that what he was destroying was not the document itself but the idea embodied in it.

These were conventions of the most formal kind which Germany deliberately disregarded in her determination to force a war. There remains the rest of the story, her many violations of the international agreements regarding the manner of waging war. She has laid automatic submarine mines on the high seas in contravention of convention number eight of the Second Peace Conference, 1908; she has bombarded undefended coast towns, dropped bombs on open cities and

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villages, and killed and maimed non-combattants, inoffensive old men, women and children. All these acts are forbidden by the Hague Conventions.

Nor is that all. Germany has systematically destroyed towns and cities. These acts of barbarism are in some cases defended on the ground that as private individuals fired on German troops, the only method to prevent a recurrence of such acts was to make an example. An example of what? Of the person guilty; or of his innocent neighbours by shooting them, as has been done, *en masse,* and burning their houses? Article 50 of the Regulations Respecting the Laws and Customs of War on Land, agreed to by Germany at the Peace Conference of 1899, reads: "No general penalty, *pecuniary or otherwise,* can be inflicted on the population (les populations) on account of the acts of individuals for which it (elles) can not be regarded as collectively responsible."

There are further atrocities. German soldiers have refused quarter, and when they have taken prisoners men who yielded up their arms on condition that their lives should be spared, German officers have, in well authenticated instances, ordered them to be massacred. Apart from humane considerations these are engagements of honour. They have not been kept. Captured French soldiers have been made to march in front of advancing German troops; until as has happened in more than one instance the prisoners themselves have in their agony called on their comrades to shoot, and thus have died for France. French children, and women with infants at their breasts, have likewise been pushed by German bayonets, a living breastwork, in front of their armies advancing to the attack. But in doing this Germany broke no rule or convention. The nations of the world had never prohibited it. It was too elementary.

In considering all these breaches of faith and of treaties a student of international law may well despair. After this war what will be the fate of mankind? Will man be able to trust in man or nation? Speaking for himself the lecturer affirmed an absolute confidence in the future. There are two ideas struggling for supremacy in Europe to-day: the rule of law, and the reign of might. When we consider who are the protagonists of right, and the fervour with which they offer themselves to the cause, there comes the conviction that right will triumph and that the rule of law founded on a

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thousand years of struggle will prevail. And this conviction nothing can shake.

We have done feeble justice to the fire and the inspiration of M. de Lapradelle's lecture. Through a misfortune the text of his address which should have reached us has gone astray. Consequently the responsibility for any faulty phrase or inaccuracy in the facts must rest with us. The lecture was delivered nearly three weeks ago; and in that time memory may become treacherous. That so large a part has been retained is a tribute to its clear-cut qualities.

LEWIS DUNCAN.

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CURRENT COMMENTARY ON RECENT ENGLISH AND CANADIAN DECISIONS.

ENGLISH DECISIONS.

It will probably be admitted on all hands that the most import recent English decision is *Nocton* v. *Lord Ashburton*.[1] Lord Ashburton brought this action against Nocton, his solicitor, claiming to be indemnified against the loss he had sustained by having been improperly advised and induced by Nocton, acting as his confidential solicitor, to release a part of a mortgage security held by him, whereby the security had become insufficient. The Court held on the facts that there was no fraudulent intent on the part of Nocton although he benefited personally by the transaction, so that under *Derry* v. *Peek*,[2] Lord Ashburton was entitled to no remedy for deceit; but that, nevertheless, he was entitled to relief on the footing of breach of duty arising from the fiduciary relation of solicitor and client. For it was admitted that misrepresentations were made by Nocton; that they were material; that they were the cause of loss to Lord Ashburton, who was entitled to rely and did rely upon the information received. *Derry* v. *Peek* it will be remembered established that in order to sustain any action of deceit, whether the claim be dealt with by a Court of law, or by a Court of Equity in the exercise of its concurrent jurisdiction, it is necessary to prove actual fraud by shewing that the false representation alleged was made knowingly or without belief in its truth, or recklessly without caring whether it be true or false; and that mere carelessness or absence of reasonable ground for believing the statement to be true, might indeed, be evidence of fraud, but such an inference could be displaced by shewing that it was made under an honest impression that it was true. What the House of Lords hold in the present case is that the decision in *Derry* v. *Peek* does not narrow the scope of the remedy in that class of actions within the exclusive jurisdiction of a Court of Equity, which, though classed under the head of fraud, do not necessarily involve the existence of a fraudulent intent,

[1] [1914] A. C. 982.
[2] (1889) 14 App. Cas. 337.

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such as was an action like the present one, where indemnity was sought for loss arising from misrepresentation made in breach of a special duty imposed by the Court by reason of the relationship of the parties. In the words of Lord Shaw (at p. 972): "When the relations of the parties have been ascertained to be those in which a duty is laid upon one person of giving information or advise to another upon which that other is entitled to rely as the basis of a transaction, responsibility for an error amounting to misrepresentation in any statement made will attach to the adviser or informer, although the information and advice have been given not fraudulently but in good faith." "When" says Lord Haldane (pp. 956-7), "as in the case before us, a solicitor has had financial transactions with his client, and has handled his money to the extent of using it to pay off a mortgage made to himself, or of getting the client to release from his mortgage a property over which the solicitor by such release has obtained further security for a mortgage of his own, a Court of Equity has always assumed jurisdiction to scrutinize his action. It did not matter that the client would have had a remedy in damages for breach of contract. Courts of Equity had jurisdiction to direct accounts to be taken, and in proper cases to order the solicitor to replace property improperly acquired from the client, or to make compensation if he had lost it by acting in breach of a duty which arose out of his confidential relationship to the man who had trusted him." This jurisdiction, which really belonged to the exclusive jurisdiction of the Court of Chancery had for the client the additional advantage that, as is illustrated by the judgment of Lord Hatherley, L.C., in *Burdick* v. *Garrick*,[3] the statute of Limitations would not apply when the person in a confidential relationship has got the property into his hands.

Hitchings & Coulthurst Co. v. *Northern Leather Co.*,[4] is one of those numerous cases where parties to promissory notes have endeavoured to escape liability under them by setting up a contemporaneous oral agreement. The note was given in part payment of goods supplied by the plaintiff to the defendant company, and D. the president of the company who had endorsed the note, set up an oral agreement made by him with the plaintiffs, contemporaneously with the promissory note, that he was not

[3] (1870) L. R. 5 Ch. 233.
[4] [1914] 3 K. B. 907.

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to be called upon to pay if the goods supplied should be unequal to sample, which he proved that they were. Bailhache, J., however, held that this alleged agreement was not one suspending the coming into force of the contract contained in the promissory note, but an agreement in defeasance of that contract, and that, it not being in writing, evidence of it was inadmissible, and D. was liable on the note.

Rex v. *Lesbini*,[5] seems to indicate that the American plea of "brain-storm," which the Thaw case made most of us familiar with, would receive little favour in a British Court of justice. The Court of Criminal Appeal there holds in accordance with the previous decision of Darling, J., in *Rex* v. *Alexander*,[6] that the test to be applied in order to determine whether what would otherwise be murder is manslaughter by reason of provocation, is whether the provocation was sufficient to deprive a reasonable man of his self-control, not whether it was sufficient to deprive the particular person charged with murder (*e.g.*, a person afflicted with defective control and want of mental balance) of his self-control.

Another case reported in the same number of the King's Bench reports is of much public value and interest. It is *The King* v. *Whitaker*.[7] The appellant, the colonel of a British regiment, was indicted for having conspired with Minto, the manager of one of the departments of Lipton Limited, and one Ness their agent at Malta, that sums of money should be corruptly given by Minto, Ness and Lipton Limited to the appellant in his official capacity, he then being a public and ministerial officer, to wit, a commissioned officer in his Majesty's service, and that the sums of money should be corruptly accepted by the appellant in his said official capacity as inducement to him in violation of his official duty, to shew favour and forbear disfavour to Minto and Ness and Lipton Limited in relation to contracts for supplying canteens between Lipton Limited and officers commanding units in the army. The appellant was convicted and sentenced to six months' imprisonment; and the Court of Criminal Appeal has sustained the conviction. The public importance of the case is obvious inasmuch as it establishes that it is a misdemeanour at common law for a public officer, whether judicial or ministerial, to accept

[5] [1914] 3 K. B. 1116.
[6] 9 Cr. App. Rep. 139.
[7] [1914] K. B. 1283.

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a bribe as an inducement to him to shew favour, or forbear to shew disfavour, to any person towards whom an impartial discharge of the officer's duty demands that he should shew no favour; and it is also a misdemeanour at common law for such an officer to conspire with others that he shall receive such a bribe, and that a colonel in command of a regiment in His Majesty's army is a ministerial officer within the meaning of the rule.

One more case in the December Law Reports calls for special mention, namely, *Goldsoll* v. *Goldman*.[8] Here we get a learned judge (Neville, J.), criticizing certain firmly established principles of the law relating to contracts in restraint of trade, as contrary to sound principle, and mischievous, and boldly advocating legislative intervention. After holding that the true proposition of law on the cases, is—not that "covenants which restrain trade to an unreasonable extent are void,"—but that "covenants in restraint of trade are void with an exception in favour of covenants which do not restrain it to an unreasonable extent,"—he holds that both the exception itself is contrary to sound principle, and also the rule which takes the protection of the covenantee as the test of whether the excluded area be, or be not, unreasonably large; while he further declares that the doctrine of severability of the terms of a contract in restraint of trade has proved mischievous. He says that contracts in restraint of trade were held to be contrary to public policy because it was considered to be in the interest of the community that every man should be entitled to carry on his lawful business, or exercise his lawful calling, without restraint. But when contracts are treated as contrary to public policy it is because their tendency is injurious, and in such cases it has not been the practice of the Courts to examine the circumstances of each case which offends against the rule and consider whether substantial injury to the public interest has arisen, or is likely to arise, from the contract under consideration. The infringement of the rule has been considered fatal to the contract although it might be capable of proof that under the particular contract no injury to the public could arise. But the origin of the above exception to the general rule that contracts in restraint of trade are void, arose from the consideration that the community was not

[8] [1914] 2 Ch. 603.

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interested in the question where a man exercised his calling; and, therefore, if abundant opportunity for so doing were left, the community was not injuriously affected by a man contracting not to do so within a limited area; but it was held unreasonable that a man should be prevented from exercising his calling even in a limited area if no advantage thereby accrued to the other party to the contract. The departure from principle, says Neville, J., becomes more startlingly apparent in that, at any rate since the decision of *Rousillon* v. *Rousillon*,[9] the only test of the legal permissibility of the restriction has been whether it goes beyond what is reasonably required for the protection of the covenantee. "If so, it is void; if not, is is good whatever the result may be to the public and the covenantor. I confess this seems to me a strange inversion of the original rule which, so far from considering only the convenience of the covenantee, regarded only the mischief occasioned to the public by hindering a man from making his living and adding to the wealth of the State by the exercise of his calling." The consequence of this doctrine was that in the famous case of *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.*,[10] "a man of genius was restrained from turning his special talents to account in any country in any part of the world, and as the result of the, to my mind, curious process of reasoning in the cases to which I have in general terms referred, this was held to be no injury to the public."

The learned judge however admits that the decisions are two precise and numerous to permit of any reconsideration by the Courts, but, he says:—

"In my humble opinion, the whole of the law in this particular matter is a blot upon what I consider to be, in other respects, an admirable system of jurisprudence. . . . During my connection with the law I have seen more undeserved suffering inflicted by this branch of it than by all the rest put together. I am aware that the question is a thorny one, but there are two comparatively small amendments of the law which I think would go far to remedy what at present I consider its harshness. Men in want of employment, or, to a less degree, in want of money, are very likely to be induced to sign any document to get it, and there

[9] 14 Ch. D. 351.
[10] [1894] A. C. 535.

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are cases where men on a few shillings a week, for which they give ample consideration in other ways, are induced to sign contracts which make it exceedingly difficult for them to obtain employment elsewhere; and I think it might well be left to the discretion of the Court to refuse an injunction in cases which it considers harsh. In most of such cases the damage caused by the breach of contract is either nil or quite inconsiderable."

Then as to the doctrine of severability of the terms of a contract in restraint of trade, Neville, J. says: "It seems to me to be in accordance both with principle and justice that if a man seeks to restrain another from exercising his lawful calling to an extent which the law, even as it now stands, deems unreasonable, the contract by which he does so, whether grammatically severable or not, should be held void *in toto*. To hold otherwise seems to me to expose the covenantor to the almost inevitable risk of litigation which in nine cases out of ten he is very ill able to afford, should he venture to act upon his own opinion as to how far the restraint upon him would be held by the Court to be reasonable; while it may give the covenantee the full benefit of unreasonable provisions if the covenantor is unable to face litigation."

As we understand the learned judge he means that covenants in restraint of trade should be held void in all cases, or, at any rate, if injurious, in fact, to the public, whether the interest of the covenantee requires such restriction or not; and that even if a restriction of this kind is not void for such reason, the Court should have a discretion to refuse an injunction if, under the circumstances, it is harsh to the covenantor; and that the terms of a contract is restraint of trade should under no circumstances be severable. We respectfully commend the judgment to the attention of the Ontario legislature. The actual points decided in the case were that the covenant in question was not too wide, and that it was severable, and that damages are essential to the right of action which a covenantee has against one who induces his covenantor to break his covenant; but that in a case where the breach which has been procured would in the ordinary course inflict damage in the plaintiff, the plaintiff may succeed without proof of particular damage.

A. H. F. L.

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CANADIAN DECISIONS.

In the course of the trial of Krafchenko, who, it will be remembered, was indicted for the murder of the Manager of the Bank of Montreal at Plum Coulee, in Manitoba, and subsequently found guilty, an important point in criminal procedure was raised. At the conclusion of the Crown's case counsel for the defence called certain witnesses for the purpose of establishing an *alibi*. He then asked that the prisoner be permitted to make an unsworn statement from the dock, instead of giving evidence on his own behalf. This was opposed by the Crown. Mathers, C.J.K.B., took time to consider, and consulted the Chief Justice of the Court of Appeal, who agreed with him that since the passage of the Canada Evidence Act permitting an accused person to give evidence on his own behalf the right to make an unsworn statement no longer existed. The request was consequently refused; and the prisoner elected not to give evidence. There were *dicta* in favour of the contrary view in *Rex* v. *Aho*[1]; but after a careful review of the authorities the learned Chief Justice came to the conclusion that since prisoners have now the right to tell their story on oath the reason for making an unsworn statement has been removed. *Rex* v. *Krafchenko*.[2]

There has recently been reported;[3] a decision of the appeal Court of Quebec in an action of *Girard* v. *Brunelle*. The plaintiff sued for an alleged libed in *La Verité*, in which paper had appeared a statement to the effect that the plaintiff, who was an author, was connected with free masonry (*affilié à la franc maconnerie*.) He pleaded that the article was libellous and untrue and published for the purpose of injuring him in his work as author, and disgracing him in the eyes of his fellow-citizens; and alleged that this insinuation published in a Catholic community caused him an irreparable injury. The defendants pleaded justification, newspaper privilege, and fair comment on the literary work of the plaintiff. The Trial Court gave judgment against the defendant for $1,000. On appeal this was reduced to $500; and on a further appeal to the Court of King's Bench

[1] 8 Can. C. C. 453.
[2] (1914) 28 W. L. R. 76; 24 M. L. R. 652.
[3] (1914) Q. O. R. 23 K. B. 427.

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(Archambeault, Lavergne, Cross, Carroll & Gervais, JJ.) this judgment was affirmed. The headnote runs in part "Publication in a newspaper of an article tending to malign (*diffamer*) an author and to make it appear that he is connected with free masonry is, in a district in which the mass of the citizens are catholic (*dans un centre de population catholique*), a libel. The right of literary criticism does not justify attacks on the character or the person of the writer."

The Innkeeper's Act, R. S. O. 1914, c. 173, gives certain rights to and confers certain remedies on innkeepers, and boarding-house and lodging-house keepers. A recent judgment of the Appellate Division of Ontario, *United Typewriter Co.* v. *King Edward Hotel Co.*,[4] serves as a useful reminder that the Act is not a codification of the law relating to the lien of innkeepers; and that innkeepers have certain common law rights which must be sought outside the statute. S. 3 (1) of the Act reads: "Every innkeeper, boarding-house keeper and lodging-house keeper shall have a lien on the baggage and property of his guest, boarder or lodger for the value or price of any food or accommodation furnished to him or on his account." The Act says nothing about a lien on goods in the guest's possession not his property. In this case a guest had brought to the defendant Company's hotel a typewriter the property of the plaintiff Company. The question was whether the common law right of the innkeeper to retain the chattel was limited by the Act. It was held that while under the Act a lodging-house or boarding-house keeper had a lien only on the property of the guest, the rights of the innkeeper were not limited to those expressed in the Act, as the statute was not intended, nor did it purport, to be a codification of the common law; and consequently the defendant Company could retain the plaintiff's property.

The case of *Seiler* v. *Funk*,[5] raises a novel point, and the names are such as Dickens might have used had he described for us in addition to *Bardell* v. *Pickwick*, a second case of breach of promise to marry. Here the defendant, doubtless actuated by that desire to reform which impels many of her sisters to demand the suffrage and makes them a crusading force to be reckoned with, agreed to marry the plaintiff, but

[4] (1914), 32 O. L. R. 127.
[5] (1914) 32 O. L. R. 99.

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on one condition: that he should forever thereafter refrain from taking any intoxicating liquor. The terms were not considered too hard. The Plaintiff consented, and sealed the agreement with a ring and other presents. In time he fell from grace. The defendant on two occasions noticed the lapse; and the report, in its precise and unemotional way, declares that "the evidence of the police constable is corroborative of her testimony." We must leave it to Dickens, or W. W. Jacobs, to clothe this statement in its appropriate garb of fantastic fact and humour. But with that we are not concerned. The plaintiff, finding that the defendant refused to marry him, sued to recover the presents and money he had lent her. The learned County Court Judge gave judgment as asked. On appeal, however, it was held that the engagement had fallen through by reason of the breach of condition on which it was entered into, and that the defendant was entitled to retain all personal presents, but not articles purchased with the plaintiff's money to furnish the house, or articles and money lent to her by the plaintiff. Had the marriage fallen through by the fault of the defendant she would probably have had to return all the presents.[6] The case is interesting as shewing that a promise to marry may to this extent be made conditional.

Where A in Ontario ships goods to B in Alberta, the goods having been sent by A "freight collect," but through a mistake of a clerk in the service of the Railway Company have been marked "freight prepaid" and so delivered to B. who is responsible for the Company's charges? In the case of *Canadian Pacific R. W. Co.* v. *Watts*,[7] decided in the Appellate Division of the Supreme Court of Alberta, this question arose. The Company sued the consignees, who were shewn to be agents for the shippers, the International Harvester Co. They were "agents holding the goods as factors." There was no evidence that the title to the goods had passed to the consignees. It was held by the Court, reversing a judgment for the Company, that the shipper is *prima facie* liable to pay the freight on goods shipped whether he be the owner or not, and that he is not relieved from this liability even by an express term in the bill of lading to the

[6] This was the rule in like case in the Roman law from, or through which, no doubt, it has descended to us: Editor.
[7] (1914) 7 W. L. R. 785.

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effect that the person who takes delivery of the goods shall be liable for the freight. The receipt of the goods by the consignee may, however, amount to evidence of a new contract to pay the freight; but such new contract was not implied in this case where the expense bill delivered to the consignee shewed that the freight had been prepaid.

The principle of *Rylands* v. *Fletcher*,[8] was applied in the recent Manitoba case of *Skubiniuk* v. *Hartmann*.[9] The owner of a tenement block employed a contractor to destroy the vermin with which the premises were infested. He knew that the contractor would use a poisonous gas of highly dangerous qualities. The contractor placed various placards and took various precautions to prevent any accident while the work was in progress; but in spite of these efforts the plaintiff's husband, who acted as caretaker of the baths in the basement of the tenement, was killed through the accidental escape of the gas. It was held that as the owner had brought the dangerous substance to his premises, he kept it there at his peril, and was *prima facie* answerable for all damage which was the natural consequence of its escape. He could not shelter himself behind the liability of the contractor, for the contractor was employed to perform a dangerous work in the very performance of which the accident had happened.

A recent case in appeal in Alberta touches a point on which little British (and by 'British' we mean within the Empire), but some considerable body of American authority, exists. The plaintiff in *Haigh* v. *Grand Trunk R. W. Co.*,[10] was a brakesman in the employ of the defendant Company on a construction train. During a lunch hour the caboose was uncoupled from the train and left standing at some distance from the other cars. The hour being over the train commenced to back toward the caboose, but at such speed that there was danger that the men in the caboose and one of the box cars would be injured if the train were not stopped. The plaintiff finding that the engineer did not observe his signals got upon the track in front of the approaching cars for the purpose of turning the angle cock of the air-brake. This would have had the effect of applying the brake and

[8] (1866) L. R. 1 Ex. 265. L. R. 3 H. L. 330.
[9] (1914) 24 M. L. R. 836.
[10] (1914) 7 W. L. R. 807.

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stopping the train. Under the circumstances it was undoubtedly dangerous, but whether it was an unnecessarily reckless thing to do was, as the Appellate Division observed, for the jury to decide. The jury found against the contention of contributory negligence. Beck, J., in giving the judgment of the Appellate Division sustaining the verdict for the plaintiff, accepted as being in accordance with the reasoning in the British Courts, the American ruling in such cases. He held that a person is justified in law, independently of any contractual or natural relationship between the person in danger and the intervener, in intervening to save from apparent probable death or serious injury a third person, unless his intervention, in the judgment of prudent persons, was under the circumstances unnecessary, reckless or rash.[11] In considering the conduct of a person in such a position one should not charge him with errors of judgment resulting from the excitement and confusion occasioned by the emergency. If the intervener be injured the ground of recovery seems to be according to the learned judge, either negligence against the person in danger, or of negligence against himself occurring after his intervention began. But on this point, with great deference, *quære*.

L. D.

[11] Some jurists have contended that there should be a legal obligation to intervene to save life in such cases. The Editor.

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THE HORSE-BREEDER'S VISION.

("They shot my greatest friend from under me—my horse Minnie, the most faithful animal in the world. God forgive them for that. I never will."—Letter from private in Dragoon Guards, published 1st October, 1914.)

Then all the warrior horses of the past,
Without beginning and without an end,
Opened their ranks innumerably vast
To welcome Minnie—this poor soldier's friend.

Untamed Bucephalus stood mounted still
By him alone who could surmount the world;
While white Marengo answered to the will
That but for Pitt the map of Europe furled.

Stout Copenhagen, that proud hungry hack,
Eclipse's grandson, he that naught could tire,
Bore still the weight of Empire on his back,
As he had borne it once through blood and mire.

They tossed their manes the nameless ones who fell
Flung like a living avalanche to death,
When Roland carried Cardigan through Hell
And all the watchers wondering held their breath.

The vision passed of beauty and of pain.

* * * * * *

The buyer left me with his piteous dole
An empty halter and a disused rein,
My fields are empty, now the mare's in foal.

Since Brierly Turk in Erin's wars was seen,
And Sorrell's stumble caused a monarch's fall,
How often empty have our paddocks been
No answering whinney coming from the stall?

Jennie I shipped a week ago to-day.
I still keep looking for her where I go.
I wonder what the price will be for hay,
While all our talk is of the wheat we sow.

By Samuel Verschoyle Blake.

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NEW BOOKS AND NEW EDITIONS.

A Commentary on the Canadian Law of Simple Contracts with Additional Chapters on The Rules Governing Canadian Appeals to the Judicial Committee of the Privy Council and the Supreme Court of Canada. By W. Wyatt Paine, of the Inner Temple and North-Eastern Circuit, Barrister-at-Law (1914). Canada: The Carswell Co. Ltd.; London: Sweet & Maxwell Ltd.

This marks a new departure in being a Canadian text-book written by an English barrister. The author states in his preface that he believes that all matters germane to the British law of Contracts in the Dominion are adequately dealt with in his book. Throughout the book the aim of the author has been to extract from the various judicial decisions considered (which include *inter alia* many judgments of the province of Quebec) the principles upon which they are founded, and he has spared no pains to arrive at correct conclusions in this particular. The book is designed to be a companion volume of the same author's sixteenth edition of Chitty's Standard work on the Law of Contracts (1912), which the same publishers have produced and which we have now before us; and in order to enhance the utility of his book and to increase its value as a repertory of British law, Mr. Paine has inserted throughout the work frequent marginal references to those pages in this latest edition of Chitty's Treatise in which a similar point has been discussed. The concluding chapters which relate to the rules governing Appeals from the various Provincial Courts of the Dominion to the Judicial Committee of His Majesty's Privy Council, and to the Supreme Court of Canada, have been prepared with considerable care, and it is believed will be found accurate and reliable.

Manitoba King's Bench Act. An Annotation of the King's Bench Act, and the Rules made thereunder. By Esten K. Williams of Osgoode Hall, Barrister-at-Law, and of the Manitoba Bar, with an index and Table of Cases prepared by A. Murray S. Ross of the Bar of the Province of Manitoba, and member of the Manitoba Statute Revision Commission. Toronto: The Carswell Co. Limited.

This book is intended to be a Manitoba equivalent of Holmested & Langton's 'Ontario Judicature Act,' as supplemented by the English Annual Practice. As the majority

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of the Manitoba Rules are identical with the Ontario Rules as they were before the revision of September 1st, 1913, and as they are set out in the 1905 edition of Holmested & Langton, the number of each former Ontario Rule is given. This will no doubt increase the utility of the book to Ontario practitioners. The writer has endeavoured to make his annotations of special use to the law student as well as to practitioners and for that reason some of the notes deal with very elementary points. This we think is a very good idea. The notes seem to be well devised and carefully prepared. The arrangement and printing of the book are excellent.

A Manual of County Court Practice in Ontario comprising the statutes and rules relating to the powers and duties of County and District court judges, and the jurisdiction, procedure and practice of the County and District Courts of Ontario, and in appeals therefrom to the Supreme Court of Ontario, with Canadian, English and American decisions, and the County Court and general sessions tariffs, and a number of special forms by M. J. Gorman, K.C., LL.B. of Osgoode Hall, Barrister-at-Law. Third Edition (1914). Canada: The Carswell Co. Ltd.; London: Sweet & Maxwell, Ltd.

We are glad to welcome the third edition of this Manual. As the author explains, it has been rendered necessary by the many changes in the rules and sections of the Judicature Act which applied particularly to County Courts, as well as by amendments to the County Courts Act itself. These changes have rendered many parts of the second edition not only useless but misleading. For instance, section 21 of the Act of 1910, and all rules and sections of the Judicature Acts providing for trials of Supreme Court actions in County Courts, and of County Court actions in the Supreme Court, were swept away in the last revision. Although 130 new cases have been added in this edition, the size of the book has not been increased.

Elements of the Law of Contract. By A. T. Carter, of the Inner Temple, Barrister-at-Law, and some time one of the readers to the Inns of Court. Fourth Edition. London: Sweet & Maxwell, Ltd. (1914).

The 4th edition of this little book has now appeared, which speaks well for its popularity and usefulness. It no

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doubt supplies the want of a somewhat simpler book upon the elements of Contract Law, than the late Sir William Anson's and Sir Frederick Pollock's famous works.

Principles of Company Law. By Alfred F. Topham, LL.M. of Lincoln's Inn, Barrister-at-Law. Reader in the law of Real Property and Conveyance to the Council of Legal Education; formerly Whewell Scholar and Chancellor's Medalist in the University of Cambridge. Fourth Edition, (1914). London: Butterworth & Co., Bell Yard, Temple Bar; Shaw & Sons, 7 & 8 Fetter Lane, E. C.

A new edition of this little book which gives the elements of English Company Law and the leading cases in a very concise and lucid manner, will be the more welcome in Canada inasmuch as the Yukon Territory last year followed the example of British Columbia in adopting practically in its entirety the English Company (Consolidation) Act 1908; and our new Ontario Company Act 1912, now embodied in R. S. O. 1914, c. 178, borrows numerous provisions from it. The book in its present edition has increased in bulk by reason of the addition of some special notes on the duties and position of receivers and liquidators, which are intended for the use of accountants. The winding-up rules also have been printed at the end of the volume.

An Examination of the Rules of Law, respecting the Admission of Extrinsic Evidence in aid of the Interpretation of Wills. By James Wigram, Esq., one of Her Majesty's Counsel. Fifth Edition. By Charles Percy Sanger, of Lincoln's Inn, Barrister-at-Law (1914). Canada: The Carswell Co. Ltd.; London: Sweet & Maxwell Ltd.

It is sufficient to introduce a new edition of this famous book by citing the words of Rigby, L.J., in Re Grainger, [1900] 2 Ch. at p. 763, who there says: "The speedy and complete acceptance by the Bench and Bar of the authoritative nature of Sir James Wigram's treatise seems to render it unnecessary to investigate earlier authorities, except so far as they are recognised or commented on therein." In the present edition by Mr. Sanger the modern cases with a few comments have been added to the footnotes, while a few points which could not be conveniently placed in footnotes are discussed in an Appendix.

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Modern Legal Philosophy Series: Vol. X.

The Formal Bases of Law. By Giorgio Del Vecchio, Professor of Philosophy of Law in the University of Bologna. Translated by John Lisle of the Philadelphia Bar with an editorial preface by Joseph H. Drake, Professor of Law in the University of Michigan, and with introductions by Sir John Macdonnell, Professor of Comparative Law in the University College, London, and Shepard Barclay, former Chief Justice of the Supreme Court of Missouri (1914). Boston: The Boston Book Company.

It is needless to say that this is a philosophical and not a practical treatise. This is sufficiently indicated by giving the head titles of the various parts which are as follows:—

Philosophical Presuppositions of the Idea of Law; The Concept of Law; The Concept of Nature and the Principle of Law.

The book is the latest number of a most interesting and valuable series for those who are concerned with the history and science of law. The editorial committee in their general introduction to the Series begin by quoting the words of Socrates:—"Until either philosophers become kings, or kings philosophers, States will never succeed in remedying their shortcomings." The book has a special introduction by Sir John Macdonell, professor of Comparative Law in the University of London, and Secretary of the Society of Comparative Legislation. We cannot do better than quote the words of Sir John Macdonell himself as an indication of the value and contents of the volume. "I cannot sum up in a sentence or two the merits of the volume. But to my mind its great service is two-fold. It is a contribution to what is in jurisprudence the theme of themes, the History of Justice; to that book, yet unwritten which describes the growth of that sentiment in ethics and in law. The second service is that the book prepares the way for a true Natural Law based upon the common elements and need in men's nature and independent of group morality. Held for centuries by jurists as the basis of their teaching and their science, and despised as mere "fustian" by Bentham and Austin, Natural Law reappears in a new form; with new arguments, not open to the old objections, it is put forward by recent writers. No one holds that there is one law everywhere to be found; that is now an obviously untenable fiction. But there are ethical criteria which are applied to all laws; there are ever-present needs; and attempts to satisfy them produce in similar circumstances similar results." A more extended review of

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this work may be contained in some future number of our Journal, but the book is not one to be lightly read or lightly reviewed.

Digest Canadian Case Law, January, 1911-September, 1914. Editor Walter E. Lear, Esquire, Osgoode Hall, Barrister-at-Law; Editor "Ontario Weekly Reporter," "Canadian Reports, Appeal Cases," etc. Toronto: The Carswell Co. Ltd.; London: Sweet & Maxwell, Ltd. (1914).

The profession generally throughout Canada will welcome this continuation of Mr. Lear's Digest of Canadian Case Law from 1911 to September last. It shews the same care and diligence as former volumes.

A Summary of the Law of Companies—Under the English Companies Acts 1908-1913. By T. Eustace Smith, Barrister-at-Law. Twelfth Edition by the Author and C. H. Hicks. Published by Stevens & Haynes, 13 Bell Yard, Temple Bar, London, Eng., 1914. Price 7s. 6d. cloth.

This handbook is primarily designed for English students reading for their final examination. It gives briefly and concisely a general view both of the principles and practice of the law affecting companies. It is a long and laborious task for the student to gain even a general knowledge of company law from our statutes, or the text books on Company Law usually found in a lawyers office. The Canadian student will find but little difficulty in noting the differences between the English Acts and those of the Dominion and his own province.

The Ninth Edition of "*A Guide to Criminal Law & Procedure*," by Mr. Charles Thwaites, an English Solicitor, and the Editor of "The Students' Journal," etc., has just been published.

It is a work intended chiefly for the use and assistance of Bar Students and Articled Clerks, in preparing for their examinations; and it is divided into four parts. Part I. treats of the elements of criminal law, and includes the definition of crime, an explanation of the chief distinctions between crime and civil injury, the divisions of crimes, the requisites of crime, the punishments of crime, the prevention

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of crime, and a brief description of all offences against the person and against property and of other offences. Part II. treats of procedure, with sketches of the various tribunals, in England, for enforcing the criminal law, and contains an outline of the proceedings before and at and after trial, including appeal and certiorari. Part III. deals with proceedings before justices of the peace; and Part IV. gives a complete list of questions (with answers) covering the whole subject of English criminal law and criminal procedure.

There are numerous citations of decided cases; and references to the statutes.

The book, as a whole, is a clear, concise and complete, up-to-date, summary of the common law and statutory law of England relating to criminal offences and criminal procedure.

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MR. JAMES CRANKSHAW.

I first saw Mr. James Crankshaw, K.C., in the spring of 1880 on the floor of the House of Commons at Ottawa, when, single handed (for the other more experienced Hansard men were asleep in the Hansard office) he was conscientiously reporting a "talk against time" by the noted Mr. Amor de Cosmos, of British Columbia, who in a long harangue, not finished when the House adjourned about 3 o'clock on the following morning, was resisting a motion of the late Hon. Ed. Blake to postpone the building of the Canadian Pacific Railway.

During that session of Parliament, Mr. Crankshaw, as a McGill law student, passed that year's law examination in addition to performing his Hansard duties. Mr. A. D. Decelles (a Quebec lawyer, then assistant, now joint librarian) was deputed by the authorities to conduct the examination in his private office by submitting, day by day, in examination week the University's printed questions to Mr. Crankshaw and returning them, night by night, with Mr. Crankshaw's answers thereto.

Later on I saw Mr. Crankshaw as a practising lawyer forging his way to the front rank of legal lights in Montreal, and when he was a member of the Montreal Debating Society (mock parliament), occupying for several sessions the position of Conservative leader, and afterwards of "Prime Minister" and "Minister of Justice." At one of the weekly meetings the society was favoured by a visit of Sir John Macdonald who, after listening for some time to the speeches, was asked to "say a few words," and he did so in his usual happy manner, with the introductory observation: "Mr. Speaker, I came to visit the 'Mock Parliament.' But this is evidently not the 'Mock Parliament;' the 'Mock Parliament' is up in Ottawa."

After the passing in 1892 of the Criminal Code, under the directing hand of Sir John Thompson, some criticism in the form of newspaper correspondence appeared alleging defects therein and deploring alleged omissions. A letter, written to the press by Mr. Crankshaw, on this subject was embodied in an editorial. In his letter he had shewn the non-existence of the alleged defects and cited several sections of the Code, fully covering the very offences alleged

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by the critics to have been omitted. Sir John Thompson wrote to Mr. Crankshaw thanking him for his defence of the Code. The late Mr. Theoret, law publisher, hearing of this, urged, and prevailed, upon Mr. Crankshaw to write his annotated work on the Criminal Code which, after three editions, stands as the leading Canadian work on the subject of criminal law. So an accident proved the seed from which a noted work has sprung.

I next remember Mr. Crankshaw as Revising Barrister for St. Lawrence electoral division in 1894, and, in 1897, as a member (with the late Judge Desnoyers and Mr. Louis Armstrong) of the board of revisors for the city of Montreal, and I also recollect the stirring scenes which took place at the time of that revision, ending with the very adroit thwarting by the revisors of an attempt to stop the completion of the work of revision by means of a writ of prohibition, the service of which was skilfully evaded.

Mr. Crankshaw is still in harness and is giving his leisure time writing a fourth edition, now in press, of his work on the Criminal Code.

THE WANDERER.

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LOCAL AND PERSONAL.

The CANADIAN LAW TIMES joins with all connected with the legal profession in regret at the untimely death of Mr. Thomas Langton, K.C., in December last. He will long be remembered as having occupied in his time a foremost place among the legal fraternity of Toronto. He was the son of John Langton, M.P., of the Township of Fenelon, who was for some time Vice-Chancellor of the University of Toronto, and Auditor-General for Canada. Mr. Thomas Langton was born at Fenelon, where his father had taken up land in the early 40's. He was educated at Upper Canada College and Toronto University, graduating B.A. 1869 (honours in classics), and M.A. 1871. He was called to the Bar in 1874 and created Q.C. in 1890. From 1873 to 1878 deceased was on the Commission for the First Revision of the Statutes, and afterwards entered the firm of Mowat, Maclennan, Downey & Langton, of which he was the head at the time of his death. He was the author of the second edition of "The Judicature Act," and also joint author of "Holmested and Langton," the well known book of practice. He was formerly a Lieutenant in the Queen's Own Rifles. He made himself a master of many studies, and held a high place as a botanist and photographer. He married in 1882, Laura, second daughter of Sir Oliver Mowat.

Among the members of the profession who are taking out commissions for active service we note J. L. Counsell, of Bruce, Bruce & Counsell, Hamilton, Ont.; Hedley Snider, of Kerr, Thomson & Snider, Hamilton, Ont., with the Mississauga Horse; and E. A. Chisholm and J. K. McKay, with the battery of Canadian Field Artillery, being mobilized at Fredericton, N.B.

Mr. Robert H. Davis, barrister and stipendiary magistrate at Richibucto, N.B., died there recently. He was about 69 years of age.

The Law Students Society at the University of Edmonton had a merry mock trial when a serious kidnapping case was unravelled, and an attempt made to bring the offenders

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to justice. One of the jury fainted during the proceedings, but she was restored in time to participate in the verdict.

We regret to announce the death at Whitby, Ont., of Major James Rutledge, barrister, and one time Mayor of that town. The late Mr. Rutledge graduated from the University of Toronto with a medal for mathematics. During his student days he served in the office of Sir Adam Wilson, and the Hon. Mr. Justice Patterson. On being called to the Bar he became a member of the firm of Farewell, McGee and Rutledge of Whitby. During the Fenian Raid Mr. Rutledge served as Captain of the Darlington Rifles, and subsequently as Adjutant and Brevet Major in the 34th Ontario Regiment.

Mr. H. S. Blackburn, of the firm of Blackburn and Weeks, London, Ont., has been appointed Local Master of the Supreme Court of Ontario, and Deputy Registrar in and for the County of Middlesex, in succession to the late R. K. Cowan, K.C.

The following officers were elected at the annual meeting of the Benchers of the Saskatchewan Law Society: President, James Balfour, Regina; Vice-President, P. E. McKenzie, K.C., Saskatoon; Secretary-Treasurer, J. K. Hunter, re-appointed, and Bursar of the Law School.

The annual meeting of the Quebec Junior Bar Association was held at the Court House of that city, Saturday, November 28th, 1914, when officers were elected for the ensuing year as follows: President, Hector Laferte; Vice-President, C. G. Power; Secretary, A. Falardeau; Treasurer, Vilmont de Billy; Committee, L. Cannon and P. Ledue. The reports presented were of a very satisfactory nature and it was decided that the Association should hold lectures during the year as in the past.

In January the Bar of Nova Scotia lost one of its leading members. Mr. A. A. Mackay, K.C., had a reputation for legal ability which extended far beyond his province, and the Dominion is the poorer by his loss. As a student in arts at McGill University, he had a brilliant course, winning, though the youngest graduate of his class, the gold medal in Classics.

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As a barrister his knowledge and attainments were of a high order, and his opinions characterised by conscientiousness and caution.

In recognition of the honour of Knighthood conferred upon the Chief Justice of the Superior Court members of the Bar of Quebec, headed by the Batonnier, Mr. Eusebe Belleau presented Chief Justice Sir Francois Lemieux with an address, conveying to Sir Francois and Lady Lemieux their homage and congratulations.

Hon. I. B. Lucas, Attorney-General of Ontario announces that in view of his appointment he has severed his connection with the firms of Mills, Raney, Lucas and Hall, Toronto, and Lucas, Raney and Henry, of Markdale.

The members of the Ontario Bar Association have undertaken to raise two sums of $1,000 each, one to purchase a machine gun to go to the front with the Canadian Forces, the other for the Belgian Relief Fund.

Sir J. A. M. Aikens, President of the Canadian Bar Association has been speaking in the west in favour of uniform laws for the various provinces. The proposal has been very favourably received. Mr. Field's address on the same subject was noticed and given hearty editorial support by the Saskatoon Daily Star.

We regret to announce the death at Brockville of Mr. Oliver K. Fraser, one of the leading members of the profession in Eastern Ontario. Mr. Fraser was 56 years of age, and had been called to the Bar in 1894. In 1900 he was appointed Local Registrar of the Supreme Court, Registrar of the Surrogate Court and Clerk of the County Court of the combined counties of Leeds and Grenville. As an indication of the esteem in which Mr. Fraser was held, we may mention that on the news of his death a special meeting of the Leeds and Grenville Law Association was held whereat resolutions were passed expressing appreciation for his services in the profession and in the administration of justice, and of condolence with the members of his family.

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The County of Carleton Law Association held its Annual Meeting on Saturday, January 16th, 1915. Mr. A. E. Fripp, K.C., M.P. was elected President, Mr. J. A. Ritchie, Vice-President, and Mr. F. D. Hogg, Secretary.

Colonel William Alexander Logie, of the firm of Chisholm & Logie, Hamilton, has been appointed to succeed Major-General Lessard as Divisional Commander at Toronto. Colonel Logie has commanded the 91 Highlanders of Hamilton and the 13th Infantry Brigade of Western Ontario.

His Honour W. A. Russell, late Judge of the Westmoreland Probate Court, died at his home in Shediac, N.B., after a short illness.

Mr. Donald McArthur, barrister, of Toronto, is dead. He was born in Blenheim Township, Oxford County, and came to Toronto in 1884, at which time he commenced the practice of law. He was a member of old St. Andrew's Church, and a Liberal in politics.

Mr. A. P. Devlin, County Court Attorney of Victoria, died at Lindsay after a long illness. Mr. Devlin who was in his seventy-fifth year had practiced law in Toronto, St. Catharines and Peterborough.

Mr. W. W. Osborne, of Hamilton, a member of the firm of Gibson, Osborne, O'Reilly & Levy, is dead, at the age of forty-eight. Sir John Gibson, our late Lieutenant-Governor, was the senior partner of the firm. Mr. Osborne was an expert oarsman in his earlier years, and a member of the committee of the Canadian Association of Amateur Oarsmen. He was a Captain of the Thirteenth Royal Regiment, and a popular officer.

At the General Meeting of the Law Society of Alberta held at Edmonton, papers were read by A. H. Clarke, K.C., on "Citizenship and Naturalization," and by Sir John Aikens, K.C., of Winnipeg, on "The *noblesse oblige* of the Legal Profession." Mr. Clarke's timely paper dealt with the

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status of alien enemies and alien friends, and also with the provisions of the Naturalization Act which came into force January 1st, 1915.

P. B. Mignault, K.C., one of the leaders of the Montreal Bar, has been appointed to succeed Hon. T. C. Chase Casgrain on the International Joint Waterways Commission. In 1906 Mr. Mignault was *batonnier,* and in 1908 he was president of the Montreal Bar Association. In 1910 he was a delegate at the Conference of the International Law Association in London, England. The other members of the Canadian section of the International Joint Waterways Commission are Mr. C. A. Magrath, Chairman, and Mr. H. A. Powell, K.C., of St. John, N.B.

"The speakers of the evening are reminded of the rule against perpetuities." This was the caveat on the toast list of the annual dinner of the Regina Law Students' Association. Over sixty students were present, and the guests of the evening, in addition to the members of the graduation class, were the Honourable J. H. Parker, His Honour Judge Hannon, and Mr. Norman Mackenzie, K.C. Mr. W. Coxworth, B.A., President of the Association, was toastmaster. "The King" and "Our Boys at the Front" were, as a matter of course, among the toasts.

Mr. Justice Archibald has succeeded Sir Charles Davidson as Chief Justice of Quebec. The new Chief Justice, who is in his 72nd year, has had a long and distinguished career. Born at Musquodoboit, N.S., he was educated in that province and at McGill University, where he won the Prince of Wales Gold Medal, and the Elizabeth Torrance Gold Medal. He was later appointed Lecturer and subsequently Professor of Criminal and Commercial law, and in time became a Governor of the University. One of his sons, Mr. Samuel G. Archibald, was well known as Professor of Civil Law and Vice-Principal of the Khedival Law School at Cairo, Egypt. From there he went to Paris to practice, and was engaged as one of the counsel at the recent trial of Madame Cailleux. Another son, Mr. John G. Archibald was the first Rhodes Scholar from Quebec.

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Mr. Wm. F. MacCoy, K.C., former Recorder of Halifax, and for many years a leader of the Bar of Nova Scotia, has died at Brighton, England.

As the result of a shooting accident which occurred some weeks ago, Mr. Henry C. Vivian, one of the oldest barristers of Winnipeg, formerly a partner of Chief Justice Howell, died at his home in that city.

Mr. J. Garfield Gibson, of Ingersoll, Ontario, has entered into a partnership with Mr. Thomas Gibson, General Counsel for the Lake Superior Corporation, under the firm name of "Gibson & Gibson," with offices in the Traders Bank Building, Toronto.

Messrs. George W. Allan, of Munson, Allan, Laird & Davis, Winnipeg; Joseph P. Foley, of Aikins, Fullerton, Foley, Williams & Aikins, Winnipeg; H. P. Blackwood, of Bernier, Blackwood & Bernier, Winnipeg; Albert B. Hudson, of Hudson, Ormond and Marlatt, Winnipeg; Herbert E. Robinson, Carman; and W. W. Coleman, Stonewall, all barristers-at-law, have been appointed King's counsel.

At the annual meeting of the Leeds and Grenville Law Society the following officers were elected for the ensuing year: President, M. M. Brown; Vice-President, J. A. Jackson, Gananoque; Secretary-Treasurer, H. R. J. Driver; Trustees—Judge Reynolds, J. A. Hutcheson, K.C., Lieut.-Col. Buell; Auditors—W. A. Lewis, J. A. Page.

Sir Horace Archambault, who is administering the affairs of the province during the illness of Sir Francois Langelier, Lieutenant-Governor, has signed the appointments of fifteen Quebec lawyers as King's Counsellors. Five of this number are Montrealers. The Montrealers are: J. H. David, C. G. MacKinnon, of Foster, Martin & Company; Lieut.-Col. H. J. Trihey, commanding officer of the 55th Irish-Canadian regiment, and member of the firm of Trihey, Bercovitch, Kearney & Lafontaint; H. J. Hague, of Meredith, MacPherson & Company, and K. A. Theberge, of the firm of Theberge & Germain. The list also includes W. H. Lynch, L. D. Paquin, P. M. Cote, H. V. P. Aylmer, F. A. Beique, Joseph A.

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Mercier, E. Lortie, Joseph Hudon, J. A. H. Cameron, the last named of Mabou, N.S.; A. W. Duclos, a McGill graduate of Hull, and Charles A. Chaveau, a member of the firm of Casgrain, Lavery, Rivard and Chauveau, of Quebec, and Lieutenant-Colonel of the 89th Regiment.

At the annual meeting of the Middlesex Law Association His Honour Judge Macbeth was elected President, and J. B. McKillop Vice-President and Treasurer.

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The Canadian Law Times.

VOL. XXXV. MARCH, 1915. No. 3.

BY THE WAY.

We publish in this number a list of the names of Ontario Barristers, Solicitors, and Students-at-law, now on active service for the Empire. Great pains has been taken to make the list complete and correct. Nevertheless we know only too well that, in all probability, it contains inaccuracies, and almost certainly, omissions. We fear also that some of these gentlemen should be credited with commissions whom we have not so credited. We shall be extremely grateful for corrections, and for any additional names which may be sent to us. In any event, if the war drags on, there will certainly be additions to be made to the list from time to time. The profession may well be proud of the list. So, too, the legal profession in England, in both its branches, is more than holding its own in this display of high and chivalrous patriotism. Up to January 23rd, 1915, there were serving with His Majesty's Forces 782 members of the English Bar; a magnificent record! In addition, and on the same date, a supplementary list of solicitors and articled clerks was issued by the Council of the English Law Society containing the names of 950 solicitors and 438 articled clerks serving with the Forces. The preliminary list contained the names of 668 solicitors and 434 articled clerks, so that of English solicitors and clerks, the total number serving is 2,490. We have not the figures for Ireland and Scotland.

In another column we set out at full length the judgment in a recent case of defamation in the Quebec Court of Appeal. The case is an interesting and unusual one embracing as it does a successful attempt by a member of the small community of Jews in Quebec to sustain an action

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for damages for defamation against one who in a public lecture in Quebec, libellously attacked all Jews in general, although not individually attacking the plaintiff. Quebec law is, of course, in the main the Civil law. But the English authorities cited seem to shew that the decision might be upheld also under the Common law.

A valued correspondent writes to suggest that the Law Society should arrange to have the Exchequer Court Reports supplied to the profession as well as those of the Supreme Court. He pertinently says: "Why should they be withheld? Especially in these days of railway construction and municipal development, they are of much importance."

The editor draws attention this month to a new feature in the CANADIAN LAW TIMES. Under the heading of Contemporary Legal Reviews and Periodicals will be found reviews of and references to the more important articles in our contemporaries. Papers often appear which would throw light on some point troubling a practitioner if he only knew where they might be found. Periodicals and reports are so numerous that no man has the time to take or read them all. This work the CANADIAN LAW TIMES will do for him. The editor hopes to make this department something higher than a mere index to current legal thought; he will give enough of the Articles treated to show something of the writer's plan and development of his subject. Finally, the yearly index to each volume of the CANADIAN LAW TIMES will contain references to all Articles reviewed and referred to; and we shall thus supply the profession with what is lacking in this country at least, a yearly digest of noteworthy articles. This is one more step in our plan of making the CANADIAN LAW TIMES the indispensable adviser and friend of every barrister and solicitor throughout the Dominion of Canada.

In our Current Commentary upon recent decisions we note the judgment given in the cases to the argument of which we specially referred in one of the introductory paragraphs of our last number. In them the position of alien enemies in time of war when suing or being sued in English Courts has been, for the first time apparently, examined in all its aspects. We notice also in connection with

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it the judgments given on the same day in certain actions brought by the Continental Tyre and Rubber Company, wherein the Court decides that a company registered in England as a joint stock company can sue in an English Court even though all the shareholders except one—and he holding a single share—may be alien enemies. Lord Justice Buckley dissented; and as the *Times* says in an editorial, though his reasoning may fail to carry conviction to lawyers, it will be generally agreed that, if the opinion of the majority is correct, the matter calls for legislation. The statutory fiction which enables an alien enemy by the transparent device of becoming incorporated, to obtain the aid of our Courts against subjects of the Crown is an absurdity, and ought to be no longer tolerated.

The Bill for the Moratorium Act, 1914, is now before the Legislative Assembly. The principal sections are sections 2, 3, 4, 5, 7 and 15.

2.—(1) No person shall,—

(*a*) take or continue proceedings by way of foreclosure or sale or otherwise, or proceed to execution on or otherwise to the enforcement of any judgment or order in any court whether entered or made before or after the passing of this Act for the recovery of principal money secured by any mortgage of land or any interest therein made or executed prior to the fourth day of August, 1914;

(*b*) take or continue any proceedings under any power of sale, or levy any distress, or take, resume or enter into possession of any land or interest therein under any power contained in a mortgage of land or of any interest therein executed prior to the fourth day of August, 1914:

(*c*) declare or take advantage of the forfeiture of any land or of any right or interest acquired therein or of any sum of money paid for or on account of the purchase money of such land or of any interest therein, or by way of deposit or otherwise, under the terms of a contract for sale or purchase made or entered into prior to the fourth day of August, 1914:

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(*d*) take or continue any proceedings for the recovery of any part of the principal money secured by mortgage or payable as part of the purchase money of any land or any interest therein payable by the purchaser or mortgagor upon any covenant or agreement as principal or guarantor or otherwise, whether express or implied, made or entered into prior to the fourth day of August, 1914, or enforce by execution or other process any judgment obtained in respect of any such covenant or agreement,—

except by leave of a judge granted upon application as hereinafter provided.

3. No forfeiture of any interest acquired under a contract for the sale or purchase of land or any interest therein, given, made or entered into prior to the fourth day of August, 1914, shall take effect or be deemed to have taken effect until after an order made by a judge as provided for in section 2.

4. Sections 2 and 3 shall not apply to any contract for sale or purchase given or to any mortgage or extension or renewal thereof made or entered into after the fourth day of August, 1914, nor to any case in which the proceedings taken are for the recovery only of interest or rent or taxes or other disbursements for which the mortgagor was liable in the first instance, nor to any proceedings taken or act done by a mortgagee in possession on the 4th day of August 1914, with respect to the land or interest in land of which he is the mortgagee.

5. If on an application the judge to whom the application is made is of opinion that time should be given to the person liable to make any payment on the ground that he is unable immediately to make the same by reason of circumstances attributable directly or indirectly to the present war, the judge may, in his absolute discretion, after considering all the circumstances of the case and the position of all the parties, by order suspend the exercise of any right or remedy, stay execution or postpone any forfeiture for such time and subject to such conditions as he thinks fit.

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7. The conditions upon which the order may be made may, include the giving of any undertaking, or the deposit in Court or otherwise of any security, or the appointment of a receiver or the granting of an injunction.

15. The Lieutenant-Governor in Council may at any time determine the operation of this Act or provide that this Act shall have effect subject to such limitations as may be contained in the Order in Council, but subject to the operation of such Order in council this Act shall have effect during the continuance of the present war and for a period of six months thereafter unless in the meantime a Session of this Legislature is held, and in that case this Act shall cease to have effect at the expiration of thirty days from the close of such Session.

All who have the interests of the country at heart will regret that the exigencies of the situation produced by the war should have rendered legislation of this kind necessary.

Some interest attaches to the information obtained by President Falconer of the University of Toronto and the Editor of the University Monthly as to the treatment meted out to German members of their staffs by various Universities in Great Britain. The storm-centre seems to have been Edinburgh. There the two German lecturers were asked by the University to resign as well as an assistant librarian who was a German. In the case of one of these lecturers, upon Mr. A. J. Balfour, the Chancellor of the University, Lord Haldane, and Lord Dunedin all writing strongly on his behalf, the University withdrew its request for his resignation on condition that he got himself naturalised before the end of September, which he did. The Assistant Librarian resigned and so did the other lecturer; and although the latter got himself naturalised and applied for re-instatement, and although the professor of Physiology nominated him as lecturer and first assistant, and appealed to the Senate to support his nomination, the Senate declined by a narrow vote to do so and the University accordingly declined to re-open the question. For the rest a letter from a professor of Cambridge seems correctly to summarize the course taken. He writes: "As regards the British Universities, so far as I can see, the only difficulty has been in Edinburgh, where, owing to some carelessness, one

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of the lecturers had failed to obtain naturalisation papers, although he had applied for them some two or three years ago. The whole of our Universities, with the exception of Edinburgh, have kept on their German lecturers, etc., wherever those Germans have become naturalised, and, in one or two instances, they allowed the Germans to become naturalised even after the war broke out. So far as I know there have been no difficulties of any kind with those Germans who have become naturalised." It appears, however, that at London, Glasgow, and Sheffield Universities there are non-naturalised Germans serving the Universities. In Newcastle the German lecturer has since Christmas been given leave of absence on two-thirds pay. On the whole, there seems to be a spirit of moderation in the attitude of the Universities, and also of the outside public, towards Germans, special facilities in several cases having been granted in order that they might become naturalised during the war.

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ONTARIO BARRISTERS, SOLICITORS, AND STUDENTS-AT-LAW, NOW ON ACTIVE SERVICE FOR THE EMPIRE.. 1914-15.

Brigadier-General	Mercer.
Lieutenant-Colonel	Logie.
" "	Wigle.
" "	Cohoe.
" "	F. W. Hill, Niagara Falls.
" "	Geo. T. Dennison, jr., Toronto.
Major	W. W. Dennison, Toronto.
"	R. M. Dennistoun, K.C. (Peterborough).
Captain	P. M. Anderson, Belleville.
"	Walter Gow, Toronto.
"	Frank McCarthy, Toronto.
"	Leslie Gordon, Toronto.
"	Leonard Outerbridge, Toronto.
Lieutenant	E. F. Newcombe, Ottawa.
"	R. D. Ponton, Belleville.
"	E. D. O'Flynn, Belleville.
"	Harold W. A. Foster, Toronto.
"	Harvey Lightbourn, Toronto.
"	Clive Thomson, Toronto.
"	Stanley C. S. Kerr, Toronto.
"	Herbert Alley, Toronto.
"	Everett Bristol, Toronto.
"	Norman S. MacDonell, Toronto.
"	Robert Bethune, Toronto.
"	Michael Chitty, (Royal Flying Squadron), Toronto.
"	G. B. Strathy, Hospital Clearing Station.
2nd. Lieutenant	Arthur Jukes Johnson (Imperial Army Service Corps), Toronto.
" "	Thomas Moss (5th Dragoons), Toronto.
Signaller	C. Harry Wiseman, Belleville.
	Charles Hamilton, Sault Ste. Marie.
	J. M. Macdonald, Toronto.
	G. R. Forneret, Toronto.
	N. M. Young, Toronto.
	J. G. Bowle, Toronto.
	George T. Davidson, Medicine Hat.
	Joseph Ditchburn, Gravenhurst.
	Colin Gibson, Toronto.
	James MacDonnell, Toronto.
	William D. Bell, Toronto.
	F. A. C. Redden, London, England.
	Eric Pepler, Toronto.
	McGillivray Aylesworth, Toronto.
	H. J. Senkler.
	W. C. Hearn, Toronto.
	S. C. Jarvis.
	Stewart McKeough.

GOD SAVE THE KING.

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LAWYERS AND PUBLIC LIFE IN WESTERN CANADA.

By those who note the large and outstanding part taken by lawyers in the public life of Great Britain at the present time, as exemplified in the persons of Asquith, Lloyd George, Haldane, and Simon; and who recall the distinguished role in national affairs played by lawyers in the long annals of British political history, some significance will be attached to the fact that in Western Canada the bar is almost an inconspicuous factor in shaping and solving the country's problems. Nor does the circumstance lose any of its suggestiveness when one is mindful of the high measure of the service that has been rendered to British public life by the profession. The essential quality of that service is found, not merely in the reserve and moderation habitual to the legal mind that account for much of the stability and restraint that have attended the orderly development of free government and the course of legislation in the United Kingdom, but in larger degree in the probity and high minded ideals of public duty British lawyer-statesmen have almost invariably shown. The institutions of government in Great Britain reflect something more than the genius of the British people for self-government. Marvellous as has been the adaptability of the unwritten constitution of England, in coordinating the old and new, and meeting the sweep of changes that marks the transition from mediaeval kingship to modern democracy, an equal wonder is found in the legal learning and resourcefulness that did the trick. And never since the time of Francis Bacon have these qualities been shown in more advantageous light, than in recent times, or in such achievements as the Home Rule legislation, and the measure that secures the supremacy of the House of Commons over the House of Lords. The deep impression made by a study of English constitutional development is the legal massiveness and impregnable consistency of its unwritten principles as well as of its fundamental documents and legislative enactments, composed by men who were masters of law. Great Britain symbolizes itself in many ways. In no way does its fabric as a State stand forth more clearly than in the structure of government and legislative framework English lawyers have done so much to raise. Free

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institutions have re-acted upon the common law of England. But unless the common law of England had been carried by lawyer-parliamentarians into the political life of Great Britain, the bed-rock of principle upon which government rests in that country might never have been found.

With lawyers in Great Britain exercising commanding influence in the councils of the nation, the phenomenon of the little part taken by Western Canadian lawyers as leaders in public affairs, is not made less noticeable when we have regard to the political activity in a large way of lawyers in Eastern Canada. In the Maritime Provinces, to a very large extent, political leadership is recruited from the ranks of the profession. Of the thirteen representatives from New Brunswick in the House of Commons, eight are lawyers. Half of the representation from Nova Scotia in the House is made up of lawyers. Almost one-third of the 65 members from Quebec, are members of the bar. Ontario sends 24 lawyers in a representation of 86 members. These figures bear striking contrast with those from the Provinces west of the lakes. Manitoba has two lawyers in its delegation of ten members. Saskatchewan thwarts our thesis by sending four lawyers among its ten members. From Alberta, of the seven members, there is but one lawyer. The seven members from British Columbia include not a lawyer. Turning to the Provincial legislatures, the same condition is found. In Saskatchewan, my information is that in a House of 54 members, there are two lawyers. In the Alberta legislature, of 55 members, there appear to be only seven lawyers. In British Columbia, the legislature of 42 members has six lawyers. The disparity in this respect between the East and West is further emphasised by the leadership asserted by Eastern lawyers in the Dominion House. Eastern lawyers who have achieved eminence in public life have won in instance after instance the highest professional standing. Their lives confirm what is a common experience in the mother country, that an interest in public affairs is not inconsistent with a brilliant position at the bar, and that the qualities necessary for professional success were equal to compel political advancement. And surely there is advantage all round and immeasureable benefit to the country that the profession should be interested in all political matters, and that it should contribute a strong working force to the law-making assemblies of the country. It is an obvious general-

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ization that platform discussion of public questions by leading men of the profession makes for a high level of debate, and an aroused and educated public opinion, however hopelessly partizan its divisions may be, and that membership of lawyers in a legislative body is of the utmost value in drafting and criticising legislation. The statement is not adequate, and does not consider certain values that should be kept in view. No student of English legal institutions can be insensible to the historic background, to the mighty memorials, to the superb dignity and setting that belong to the law in England. The tide of English life for centuries has flown through the Courts at Westminster Hall, making of English law, not merely a great system of jurisprudence, but a priceless inheritance to the British race. As such, it is the possession of every Province of the Empire, giving vitality, organization, and tradition to all institutions which rest upon the security of law, and furnishing an imperishable and conscious bond of union between the colony and the motherland. Herein lies no small advantage from our connection with Great Britain. No Province of the Dominion, however young in years, can be said to lack for an historic past and a disciplined point of view when woven into every line of its constitution, as if drawn from its own experience, is 700 years of English common law. It makes of every corner of a western Province, an extension of England in very fact, just as we like to think of England as an older portion of Canada. For as the common law runs in the Dominion, outside of the Province of Quebec, with the same living force as it does in England, it means that rooted in our midst as though native to our soil, and reared through centuries of our own experience and exertions, is an institution that endows us with one of England's proudest and oldest attributes of nationhood.

We must appreciate, however, that in England the full effect of its legal system as a national asset is not found exclusively in the work of the Courts, but in a very large measure is derived from the close relationship that exists between the profession (including the judges), and public affairs. The Lord Chancellor passes from his Court to the House of Lords. The Attorney-General may spend the day in arguing a revenue question or some matter of governmental interest in the Court of Appeal, and his evening in debate in the House of Commons. Many of the judges as

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peers sit in the House of Lords and take part in its deliberations. At all great State functions, His Majesty's judges are present. The installation of the Lord Mayor of London is marked by a ceremonial visit to the Royal Courts of Justice, and an address from the Lord Chief Justice. The annual Guildhall banquet includes a toast to the judges. Then the fame of a lawyer who is a member of the House of Commons finds a large part of its lustre in his political achievements, so that his day's work in Court is combined by the public with an important speech he may make in the evening, say before the Primrose League in the Royal Albert Hall. The Courts and the profession thus come to occupy in the mind of the nation their legitimate place as one of the great institutions of the State that give it concrete existence, and mould its general life upon high and traditional lines. How poorer public life in England would be; what a falling off in its national outlook would take place, if this intimate connection between the profession and the public should disappear by the bar confining itself to the affairs of its clients; and how shrunken would become the profession by surrendering itself to the benumbing effect of its routine labours? Its members would vie with each other in professional keenness and capacity for professional drudgery, and intellectual prowess would still remain, but the large and liberalizing vision and stimulating tests of mental greatness that are found in commingling professional work and national service would be gone.

I thus come to the situation that exists in western Canada. I think the whole institutional life of the country may be made richer if the profession as a high civilizing agency could take its just place in it, and that to do so would result in a corresponding gain to the ethical interests of the bar.

The present condition is so unexpected that no estimate of the future can be made, were it possible to venture upon one, that is not based upon an understanding of some of the influences which have created the existing anomaly. If these are permanent, one would be entitled to have a sense of concern not for the profession, but for the well-being of the country. For I would consider that if the bar of Western Canada, contrary to what is and has been the instinctive attitude of the bar in Great Britain and Eastern Canada should prefer to keep itself immersed in professional work,

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and if certain conditions that are taking place indicate its considerable elimination from the public life of the country, not only would a weakening and break-down in parliamentary government as we hitherto have carried it on, take place, but what should be a great force in the moulding of national ideals would be lost to the State.

Let me begin by saying that the blame for the present or threatening condition, if fault there be, does not lie at the door of the country itself. No one can live in it without feeling the strength of its appeal to do the very best that is within him, whether his work is upon intellectual lines or otherwise. The vastness of the country instead of dwarfing the individual and inducing a sense of fatalism gives perspective and makes challenge to his imagination. The barriers that separate Eastern Canadian provinces into political, and in a measure, into social, entities have no existence in the Western provinces. They have common interests, common problems and common points of view to be dealt with by men of common sentiments and habits of life. All questions, therefore, take on the spaciousness of the whole west, and the thoughts of men broaden out to an equal measure. I doubt if Eastern men even when legislating at Ottawa for the whole Dominion can visualize the vastness of the west blending in essential and working unity. Perhaps the great lakes and the long stretch of waste country between the West and East interrupt and confuse the vision for them. Well, there is the inspiration Western men have for their own work. As time goes on and the progress of the country increases, showing itself in larger cities and new centres of population, greater areas of land under cultivation and multiplying railroad systems, the appeal will take on increasing emphasis. For the present, this inspiration has no effect in attracting lawyers into public life. It is doubtful whether or not they are conscious of it, or if they were, that they would heed it. The incentive to enter public life comes, where the motive is not altruistic, from the traditions that surround it, and the prestige it bestows. These things do not exist in western politics in nearly the same degree that they do in the East. The inspiration in the West to the man of principle is limited to the opportunity that is afforded to him to do some measure of useful public work. This inducement should be sufficient. In a busy country

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to a lawyer absorbed in his work, it is not surprising that it should be overlooked.

On the other hand it is the view not only of the profession but of the public of the Lower Provinces that the biggest career offered to a lawyer, is in public life. This view also obtains in Quebec and Ontario, except with a few Counsel in Montreal and Toronto with large practice and certain temperamental inclinations. Even they would admit that if the pathway to political eminence were not so thorny, it is crowned with higher rewards that is professional success. It might be thought that if provincial politics in the West have not appealed to lawyers, the Dominion arena would prove as attractive to them as it does to their Eastern brethren. It does not. Sentiment and tradition have had time to become deeply rooted in the East. No figures have stood out of national importance to arrest the public imagination, other than political leaders. To them there has gathered the full measure of homage that a country reserves for its greatest sons. Perhaps after the war Canada will have other heroes, but up to the present the men who have entered Canada's Pantheon have gone through the doorway of public life. To emulate the careers of these men seems in the East the obvious thing for the lawyer of high talents to do.

When the subject of the apathy of western lawyers towards public life is mentioned among them, they usually assign as the reason the distance from Ottawa, and the disruptive effect politics would have upon their business. However true this would be in the case of membership in the House of Commons, it has no application to a seat in a provincial legislature. It is, also, insisted upon by them that they are interested in securing a competency, and that when this object is accomplished, they will turn their attention to the country's needs. If this were the attitude of men of no capacity for public life, one could disregard it. When it is said by men of force and ability, it has significance, for it means that they will never enter politics however comfortable their means may become. The man who is interested in politics is generally heading for it in some pretty overt way at an early age, and if he is to be any considerable figure in it so as to make it worth his while to engage in it, will not be found making nice calculations as to whether or not he can, or as to when he will be, able to afford it.

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Nor is the conclusion that lawyers in the West are not inclined to enter politics vitiated by the circumstance that expressions of distaste for public life are made by Eastern lawyers. The outstanding fact is that large numbers of lawyers of ability in the East, who if they so desired could devote themselves to their profession with as lucrative results as are obtained in Western practice, do enter politics.

I come to what is a more important consideration than any I have mentioned. Over against this attitude of Western lawyers is to be set the formidable activity and powerful displacing effect of the Grain Growers' movement of the west in their organized advancement of political reforms for the amelioration of Western conditions. Their organization is well disciplined, is most capably led, and has become the controlling factor in the politics of Saskatchewan and Alberta, and in portions of Manitoba. It carries on by local associations and parent groups, under the guidance of central executives in each of the Provinces, an educational propaganda for the study and promotion of the economic interests of the West. Its yearly provincial conventions are Parliaments for the discussion of Western affairs, and have a notable effect on the politics of the West. One may express unrestrained sympathy for the movement, without abating one jot of his contention that the representative institutions of the West will not attain to the full measure of their usefulness, and will not enter into possession of their spiritual heritage as off-spring of the Mother of Parliaments, if lawyers of high-minded purpose and sincere convictions have no share in them. It is not an unnatural presumption that the farmers of the west have the view that their movement should be exclusively in their own hands, and that their legislative proposals will be safest when confided to representatives drawn from themselves. One does not suggest that this is the avowed policy or even an implication of the movement, and it certainly is not an explanation of the fact that few lawyers are in public life in Western Canada. The movement is pregnant with suggestions that with the field of reforming and radical activity in the hands of this powerful and thoughtful organization, and with lawyers indifferent or averse from sharing in parliamentary representation, the conditions one has been noting, and which one fain would hope are temporary or accidental, will become permanent. The event would be unique in the working of legis-

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lative assemblies in the Empire. Some people would regard it with composure as making for business-like directness, and the end of legal buncombe. If the legislature of a Province could be reduced to the character of a municipal council, there is no reason why the views and tests of the man of business or of the farmer in the disposition of its business should not be sufficient without any other guide. Since it exercises legislative jurisdiction over a wide and complicated surface of civil rights, which cannot be disturbed without careful regard to far reaching and speculative results, it is necessary that it shall proceed as a deliberative and responsible assembly under the guidance of its own members, and not through promptings of hired advisers, whose advice it cannot understand.

According to all experience and the most elementary of considerations, the disappearance of a capable quota of lawyers from a law-making body, is not to be thought of. One cannot imagine the shrewd and discerning Grain Growers of Saskatchewan thinking differently, or that they or the farmers of Alberta will not provide for an adequate representation of lawyers in the legislatures of those Provinces. The profession has humble and practical functions which are indispensable to the good government of the State. Its higher service is in helping to build the State for a thousand years to come upon the foundations of the thousand years that are past.

W. H. TRUEMAN.

Winnipeg.

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LANDLORD AND TENANT: AGREEMENTS TO PAY TAXES.

The general rule is well known to every practitioner that when he uses a word of art in any document, that word carries its full legal meaning; a meaning which may not appear on the surface. What that meaning is can often be determined only by a consideration of the authorities and judicial definitions. Hence the importance, which no one will deny, of a clear knowledge of the effect and extent of such interpretations; particularly as a word of art once used is with difficulty controlled by the context.

There are not only words of art, there are also phrases of art. It is the purpose of this paper to examine one of these, and incidentally to shew how a lack of appreciation on the part of a draftsman of the effect of this phrase has raised a neat question in statute and conveyancing law.

Let us suppose we have a lease under the Short Forms of Leases Act the reddendum of which is as follows: "Yielding and paying therefor during the said term unto the said lessor the sum of $40 a month without any deduction, defalcation or abatement whatsoever." Let us further suppose that there is the usual Short Form covenant to pay rent, but that the Short Form covenant to pay taxes is missing. What is the result? Is the tenant entitled to deduct the taxes from his rent? First as to the cases, of which there are five, for the meaning of the phrase:—

The earliest case is that of *Cranston* v. *Clarke*.[1] This was an action of covenant. The tenant had agreed to pay the rent "without any deduction, or abatement whatsoever." The question was whether he had a right to deduct out of the rent the money paid by him for the land tax. It was held that he had; on the ground that as the Land Tax Act enabled tenants to deduct moneys paid for the land tax out of the rent, the money might always be deduced unless there was an express agreement that it should not.

The next case, that of *Bradbury* v. *Wright*,[2] laid down precisely the opposite doctrine. The head-note reads: "On

[1] 1753, Sayer's R. 78.
[2] 1781, 2 Doug. 624. See also a case referred to by Holt, C.J., in *Hopwood* v. *Barefoot*, 1709, 11 Mod. 238.

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a grant of a fee-farm rent 'without any deduction, defalcation or abatement for or in any respect whatsoever' the grantee is entitled to receive the full rent without deducting the land tax." It was argued that these general expressions should not be extended to Parliamentary impositions; that they were "a sort of words of course and in truth meant nothing more than was comprised in the reservation (of the rent) itself." A strong effort was also made to distinguish two prior cases, *Brewster* v. *Kitchen*,[3] and *Hopwood* v. *Barefoot*,[4] where it had been held that the tenant was not entitled to deduct the taxes, on the ground that in those cases the covenant not to deduct specifically mentioned taxes. Lord Mansfield, however, in giving the judgment of the court said:—

> "There can be no words stronger than those in "the present case; and it would not have been clearer "if the deed had run 'without any deduction, de- "falcation or abatement for taxes;"

and the Court held that the rent should be paid without any deduction for the land tax. As the statute under which this decision was made was an annual Act it is not printed in the Statutes at large; but from a note to the case in Douglas' Reports it appears that the clause under which the right to deduct was claimed is to be found in sec. 6 of 4 William and Mary, ch. 1, "An Act for granting to their Majesties an Aid of four Shillings in the Pound for one year for carrying on a vigorous War against France," Statutes at Large, vol. 3; this section having been copied in all the subsequent Land Tax Acts. The section in effect is as follows:—

> "S. 6. Therefore, it shall and may be lawful to "and for landlords, owners, etc., of such manors, "lands, tenements, etc., as are charged with the "pound rate to abate and deduct and to retain Four "Shillings in the Pound for every fee-farm rent or "other annual rent or payment charged upon or issu- "ing out of the premises; and all persons entitled to "such rents are required to allow such deductions upon "receipt of the residue of such moneys as shall be "due and payable to them for such rents or annual "payments reserved or charged as aforesaid."

[3] 1698, 1 Ld. Ray., 317.
[4] 1709, 11 Mod. 238.

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Fee-farm-rent was a rent reserved upon a grant in fee.[5] Consequently, a landlord or owner under this Act stood in the same relation to the grantee of the fee-farm-rent as does a tenant to his lessor under our Assessment Act.

The next case is *Bennett* v. *Womack*.[6] Here there was an agreement to purchase the lease of a public house which was described as held at a certain net annual rent upon the usual and common covenants. The lease, however, contained a covenant by the tenant to pay land tax, sewers rate, and all other taxes and the purchaser refused to proceed on the ground that the phrase "a net annual rent" was not such as would cover the lease in question. In giving judgment against this contention Lord Tenterden, C.J., said:—

> "When a party stipulates to receive a net rent, "that means a rent clear of all deductions to which "it would otherwise be liable; the covenant to pay "land tax and sewers rate must, therefore, be an "usual covenant in a lease reserving a certain net "rent."

Bayley, J., also says,

> "I entirely agree upon both points. . . . "Where a tenant agrees to give a net rent, covenants "to secure that are usual and common. Now the "covenant to pay sewers rate is merely a covenant to "secure a net rent to the landlord."

Holroyd and Littledale, JJ., concurred.

The next case, *Grantham* v. *Elliott*,[7] was decided in Upper Canada. This was an action of replevin. The tenant had covenanted to pay £100 yearly rent, "without any deduction thereout for or by reason of any matter or thing whatever." The question was whether he could be allowed to deduct from his rent the taxes paid by him for house and premises. He had paid the taxes for several years without claiming any deduction, and the claim was made this year for the first time. The landlord obtained a verdict for the full rent with leave for the plaintiff to move to deduct the taxes. This course was taken; but the Court in deciding against the plaintiff said: "We have considered the point

[5] Fitz., N. B. 210, c.
[6] 1828, 7 B. & C. 627.
[7] 1842, 6 U. C., Q. B., O. S., 192.

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and we are of opinion that the plaintiff (sic) is entitled to his verdict for the whole sum, that is without deducting the sum paid for the taxes."

The last case, *Parish* v. *Sleeman*,[8] is one which was decided after a very thorough argument in two Courts where all the prior decisions were reviewed. There was here an agreement to demise a farm for fourteen years "at the yearly rent of £40 payable quarterly free of all outgoings;" by which the parties agreed to "grant and accept a lease on the above and other usual terms." The case first came before Vice-Chancellor Stewart on an appeal from the certificate of his Chief Clerk. The learned Vice-Chancellor passing by the rather able argument addressed to him held that the words "free of all outgoings" were not enough to relieve the landlord from the payment of the land tax and tithe commutation charge. On a further appeal to the Lord Chancellor this decree was reversed. The case was excellently argued, the authorities reviewed and a considered judgment given. The Lord Chanceller based his decision on the ground that the tenant is primarily liable both for the land taxes and the tithe rent charge. He is bound to pay both, though having made his payments he is entitled to deduct. Therefore, both are "outgoings" of the tenant. The cases of *Bradbury* v. *Wright* and *Bennett* v. *Womack* were approved; and *Cranston* v. *Clarke* was not followed.

All the above cases are applicable to the condition of affairs in Ontario for the procedure under the Land Tax Act has been adopted in this Province. Here, for example, where the owner is a non-resident, while tenant and owner are both assessed, the Act provides that 'the tenant for the purpose of imposing and collecting the taxes shall be deemed to be the owner.'[9]

So far so good. A line of cases commencing over 120 years ago ending with a strong case which severely shook the authority of the only case affirming the contrary, establishes that this phrase is in effect a covenant to pay taxes; those taxes, that is, for which the tenant is in the first instance liable; and which in default of such an agreement he would as between him and his landlord be entitled to deduct from the rent.

[8] 1859, 1 Giff. 238, and 1860, 1 DeG. F. & J. 326.
[9] R. S. O. 1914, c. 37, s. 38, ss. 4 and 10.

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Turning now to the Short Forms of Leases Act we find the reddendum and the extended Form of the first two covenants of an ordinary lease at $40 a month read as follows:

"Yielding and paying therefor, yearly and every "year, during the said term unto the said lessor, the "sum of $40 a month.

1.	2.
"1. The said lessee "covenants with "the said lessor.	"1. The said lessee doth hereby covenant "with the said lessor in manner follow- "ing, that is to say:
"2. To pay rent,	"2. That he, the said lessee will, during "the said term, pay unto the said lessor "the rent hereby reserved, in manner "hereinbefore mentioned, without any "deduction whatsoever.
"3. And to pay "taxes,	"3. And also will pay all taxes, rights, "duties and assessments whatsoever, "whether Municipal, Parliamentary or "otherwise now charged or hereafter to "be charged upon the said demised "premises, or upon the said lessor on "account thereof."

Looking at the form as it stands under the Act we note that the covenant to pay rent includes the phrase "without any deduction whatsoever." It might be asked whether in such a case the explicit covenant to pay taxes serves any useful purpose. One answer to this is that it is a redundancy due possibly to overcaution, which is still found in the best English Forms. Almost invariably when the agreement is that the tenant shall pay the taxes the phrase and the subsequent more detailed covenant are both to be found. See Blythewood and Jarman, Conveyancing Precedents, 1885, pp. 443-4, 447, 452, 481, 593. See also Davidson Precedents and Forms of Conveyancing, 3rd Edition, 1878, Vol. 5, Part 1, Forms Nos. 11, 12, 13.

The converse is also true and when the lessor covenants to pay the taxes this phrase and its amplification in the tax covenant never appear. Both are dropped. Indeed it would be absurd to drop the covenant without deleting the phrase. For a form where this change is made, see Blythewood and Jarman, Form No. XXXIII. at page 475. It is obvious that the draftsman of the Short Forms of Leases Act never had in mind and never provided for those cases in which the parties would wish to delete the covenant to pay taxes.

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With the full form before him, knowing that both phrase and clause should be struck out if the agreement is that the landlord shall bear the taxes, the position of the solicitor is simple. But for unwary persons using the Short Forms provided by the Act and looking only at the condensed covenants, has the Act not set a trap? If the covenant to pay taxes is struck out there remains the covenant to pay rent "without any deduction."

The rights of the parties in such a case and the weight to be given to the presumption raised by the absence of the covenant to pay taxes may be considered in a subsequent paper. All that need now be said is that in such a case it can be argued with considerable force that the acts of parties show lessor and lessee did not mean to use the words in the sense in which they have been interpreted. But in the absence of any such clear evidence of intention the courts will give the words their legal meaning. The simpler case which it is intended here to discuss is that of a lease purporting to be made under the Short Forms Act containing in the reddendum the clause above mentioned, and a covenant to pay rent, but no specific covenant to pay taxes.

The lease in its extended form will read as follows:—

> "Yielding and paying therefor, yearly and every "year during the said term unto the said lessor the "sum of $40 per month in advance without any de- "duction, defalcation or abatement whatsoever;
>
> "(1) And the said lessee doth hereby covenant "with the said lessor in manner following, that is to "say:
>
> "(2) That he, the said lessee, will during the "said term pay unto the said lessor the rent hereby "reserved in manner hereinbefore mentioned without "any deduction whatsoever."

and in its short form will read as follows:—

> "Yielding and paying therefor, yearly and every "year during the said term unto the said lessor the "sum of $40 per month in advance without any de- "duction, defalcation or abatement whatsoever;
>
> "(1) And the said lessee covenants with the said "lessor,
>
> "(2) To pay rent."

Here even the unwary person, who is possibly not entitled to a great deal of sympathy, must know that a new phrase

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has been introduced into the Short Form. He is put on his guard, so in this case there is no trap.

But, it may be argued, by passing the Short Forms of Leases Act and by placing a specific covenant to pay taxes immediately after the covenant to pay rent without deduction the Legislature has in effect repealed the judicial interpretation placed on these words, and has declared that henceforth, at least in all leases made under the Short Forms Act, this phrase "without any deduction" shall no longer mean what the Courts have declared it to mean. There might be truth in that statement if we confine ourselves to the case where the parties have not added the phrase to the reddendum. But the legislature has neither expressly nor by implication attempted to interfere with the effect of the phrase when the parties themselves have made use of it. To urge the contrary would be to forget some of the first rules of legal interpretation.

The Statute was first introduced in the Province of Canada in 1851;[10] being copied from an English Act, 8 and 9 Vic. c. 124. The Short Form under this English Act has been very little used by solicitors in that country; and there are no cases on it.

One of the rules for the interpretation of Statutes is put as follows by the learned author of Dwarris on Statutes:[11]

> "First in importance according to these able and "experienced judges is the consideration of what was "the rule at Common Law. 'To know what the com-"mon law was before the making of a statute, "whereby it may be seen whether the statute be in-"troductory of a new law, or only affirmative of "the common law is the very lock and key to set "open the windows of the statute.'[12] Further as a "rule of exposition statutes are to be construed in "reference to the principles of the common law. For "it is not to be presumed that the Legislature in-"tended to make any innovation upon the Common "Law further than the case absolutely required. The "law rather infers that the Act did not intend to "make any alteration other than what is specified "and besides what has been plainly pronounced; for "if the Parliament had that design, it is naturally "said they would have expressed it."

[10] 1851, 14 and 15 Vic. c. 8.
[11] 2nd Edition, p. 564.
[12] 2 Inst. 301, 3 Rep. 31, 13 Hob., 83.

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With the question whether the Legislature intended to reduce, and by implication has reduced, the words "without any deduction" in the Short Forms Act to a meaningless phrase, we are not concerned. Clearly neither by express words nor by necessary implication has the Legislature said or intended to say anything overruling the decisions given above. The Act can have no effect upon the meaning of the phrase when used by act of parties, even if the document in which they use it be expressed to be made in pursuance of the Short Forms of Leases Act.

The object of this Act was not to alter any case law; but to provide a form of lease which would save expense and time in drafting. It could hardly be contended that if the English equivalent of our Act had been brought to the attention of Eady, J., in *Re Warriner, Brayshaw* v. *Ninnis*, 1903, 88 L. T. 766, 767, he would have decided differently. There the lessee covenanted to pay the rent, "without any deduction, except for property tax; and to pay all rates, taxes, assessments and impositions." The question was who was to bear the cost of repair of a drain, the work being done by the municipality. Eady, J., held that this was an "imposition;" but also held that if the cost had been paid by the tenant and she had attempted to deduct it from the rent she would have been making a deduction, although the covenant was to pay rent clear of all deductions.

In speaking of the English Statute, Foa (1913 ed.) says:

> "A somewhat succinct form of lease has been pro-
> "vided by Statute (8 and 9 Vic. 124). But although
> "this enactment is still unrepealed, such form is
> "seldom, if ever, resorted to, and it is, therefore,
> "deemed unnecessary to set it out."

If the form provided by the Act had been used extensively in England, this small cloud in the statute would probably have been discovered, and Parliament would have deleted the phrase "without any deduction." With those three words struck out, the form will not only be flexible, but also, as conveyancers have found, very suitable in which to express the average agreement between landlord and tenant.

LEWIS DUNCAN.

Toronto.

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EX-PRESIDENT TAFT AT THE UNIVERSITY OF TORONTO ON THE PRESIDENCY OF THE UNITED STATES.

It may safely be said that it was not only interest in the personality of the lecturer, but, in great part, also interest in his subject, when treated by him, that crowded Convocation Hall to the roof on all the three lectures, which Mr. W. H. Taft delivered at the University of Toronto on February 10th, 11th, and 12th, being the first delivered under the Pearson Kirkman Marfleet Foundation. The "pious founder" was Mrs. Marfleet, of Prophetstown, Illinois, who endowed this lectureship in memory of her husband. The Governors of the University have established and agreed to maintain the lectureship in perpetuity, and have undertaken to appoint at least once in every four years some person or persons to deliver the lectures, who shall, as far as possible, be chosen with regard to their special ability to set forth some phase or phases of the national movement of the United States or Canada or both. The University is indeed to be congratulated on having secured ex-President Taft as their first lecturer.

The presidency of the United States is probably in respect to power and responsibility the highest position attainable by a private citizen in any country in the world. As such it possesses a special interest to all students of political institutions. But the interest of the subject is immensely enhanced when it is discoursed upon by a man of the practical experience of Mr. Taft. As he rightly said, the paucity of ex-Presidents of the United States places him among a small and select class in regard to his subject. One predecessor he has had in recent years in ex-President Harrison, who has written on the Presidency in his book "This Country of Ours," a second edition of which was published in 1897. But Mr. Harrison's political experience before he was elected to the Presidency, was confined to membership of the Senate, whereas Mr. Taft was Solicitor-General of the United States from 1890 to 1892, a United States Circuit judge from 1892 to 1900, Secretary of War in President Roosevelt's Cabinet from 1904 to 1908, and was elected President in the following year. He has, therefore, had great governmental experi-

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ence under the Federal Constitution and speaks with convincing authority. As he himself wittily remarked Mr. Squeer's in Nicholas Nickleby illustrated his method of education in Dotheboys Hall, by saying that he would make a boy spell 'window,' and then set him to clean the windows, thus causing him to obtain a real grasp of his subject. "I," said Mr. Taft, "cleaned the window first, and now I am trying to spell it." President Woodrow Wilson, it may be observed, spelt the 'window' some twenty-five years ago in his 'Congressional Government,' while now he is trying to clean it. Every student will hope that when he has completed his term,—or second term,—of office, he will correct his original spelling, in a new edition of his little classic.

Mr. Taft's lectures explained something more than the Presidency. The broad humanity, keen sense of humour, the geniality and sterling common sense displayed in his remarks, would make him popular with any audience; and if he had depended on the votes of his hearers for another term he would undoubtedly have been elected unanimously.

Mr. Taft, in his first lecture, deprecated attributing any very great measure of personal power to the President of the United States. The truth is, he said, that "great as the President's power is, he is more concerned with the limitations to it, than, like little Jack Horner, with the great things he can do." But before he had completed his remarks, he left on the hearer the impression that the President's power during his term of office was very much what the President likes, or, greatly daring, cares to make it. Mr. Taft declared that a Prime Minister in England exercises more power than a President does. This, however, may certainly be questioned. No doubt under the modern system of single constituencies and complete party organization, under which members of the House of Commons have very largely ceased to be representatives, in the old sense of the word, and become mere delegates acting under a mandate, a subservient majority might maintain a prime minister in power after his policy and legislation had ceased to correspond with the wishes of the country. But such a position of matters could hardly arise before a Government had been in power for some years: and the Parliament Act, 1911, by reducing the period of parliament to five years, and enacting that for a measure to become law over the head of the House of Lords, two years

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must elapse between the second reading of a Bill in the House of Commons in the first session, and the third reading in the third subsequent session, has done much to render such a thing impossible. The House of Lords would revert to its old function of insisting that before Bills which might reasonably be thought contrary to the real wish of the electorate, should become law, the country should have an opportunity of pronouncing upon them. Besides, in a grave case, the King could still resort, according to such standard authorities as Sir William Anson and Mr. Dicey, to his prerogative right of dissolving Parliament. But a President can say,—like the French President MacMahon in a famous Punch cartoon—"*J'y suis; J'y reste.*" There is no power short of impeachment which can get rid of a President during his term of office no matter what he does. A recent American writer, Mr. Baldwin, says in his Modern Political Institutions:—'I think it may fairly be said that of the leading Powers in the world, two only in our time represent the principle of political absolutism and enforce it by one man's hand. They are Russia and the United States.' Mr. Taft would certainly repudiate any such language. Let us then see what a President of the United States can do during his term of office, taking Mr. Taft as our monitor and guide.

To begin with there is the veto power. Or to be more precise, the President has power to refuse to sign a Bill though it has passed the House of Representatives and the Senate, in which case the Bill will not become law unless, on reconsideration with the President's objections, it be again passed by a two-thirds vote of both Houses. This veto power of the President is by no means as 'dead as Queen Anne,' who was the last monarch to veto a Bill in England. It is a power constantly exercised. It is to be considered, according to Mr. Taft not an executive, but a legislative power. The President, by nature of it, participates in legislation. He has to consider the wisdom of the Bills submitted to him for signature, and not merely their constitutional validity. It is absurd, said Mr. Taft, to call the President's veto a royal prerogative. It is not the act of an hereditary monarch, but of one elected by all the people. "If the people really want legislation," Mr. Taft explained, "the veto won't prevent it, though there may be a delay of three or more years." It, perhaps, takes an ex-President to be quite so philosophical.

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The commonalty of England would scarcely be satisfied to have legislation, which they really desired, held up for three or four years at the will of a single man. "But," said Mr. Taft, "my idea of a real reform is one which carries gradually so that the very contest shews the value of what has been achieved. The prevailing idea of reform now-a-days is that if you can't have a thing to-morrow morning at breakfast, it's not worth while to have it at all." "As a matter of fact," he claimed, "the President frequently is more likely to represent the sentiment of the people as a whole than is Congress itself."

Then the Constitution provides that the President shall be Commander-in-Chief of the army and navy of the United States. But this power may be so exercised, as Mr. Taft shewed, as to nullify the provision which places the power to declare war in the hands, not of the Executive, but of Congress. Nominally there may be no declaration of war by the United States without the assent of Congress, but as head of the army and navy, the President can order military movements which must inevitably involve war; and the Supreme Court has held that if, in fact, war does exist, it is not necessary to have a Congressional law declaring it. Thus the President of the United States is responsible for the protection of American citizens abroad, and his right to order the naval forces to land on foreign territory to protect American citizens has never been questioned. The Vera Cruz incident was an example. "That," said Mr. Taft, "was nothing but an act of war."

In connection with the power of the President last referred to may be mentioned the provision of the Constitution that 'he shall receive Ambassadors and other public Ministers.' This, Mr. Taft was careful to observe, does not mean merely, as it might be supposed to, that he must receive them at the White House and employ a special flunkey to shew them in. It means that the President conducts all correspondence with foreign countries: and that it is for him to determine who is the Head of a foreign country when he sends ambassadors. The refusal of the President to recognize Huerta had practically driven that ruler from power. Now there was the similar question of recognizing either Carranza or Villa. "An exercise of the power of choice between two rotten apples," said the lecturer, "which may have very significant results."

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Perhaps, however, the point where the advantage of having a Constitution explained by a man who has really worked it was most apparent in these lectures, was when Mr. Taft shewed how much was involved in the provision of the Constitution that the President 'shall take care that the laws be faithfully executed.' It appears that the word 'laws' in this clause has been given a very wide construction. It is held that it does not mean merely statute law. It includes, not only treaties, which the Constitution expressly declares to be 'the supreme law of the land,' but it includes any right secured under the Constitution. Thus when the time expired in respect to the government of the Canal zone at Panama, Mr. Taft advised President Roosevelt that he should take the responsibility of seeing the laws enforced under the above constitutional provision,—"and Roosevelt didn't hesitate to take it. It was a pleasure to serve under Roosevelt." So, too, under this power or duty President Cleveland sent General Miles to Chicago, at the time of the Great Railway Strike of 1894, to remove the obstruction to traffic, because the law of the United States required the mail to run, and inter-State commerce to continue, and therefore he maintained his right to intervene. Again, as Mr. Taft pointed out, many laws do not affect private rights in such a way as to come before the Courts for construction. In such cases their construction is purely in the hands of the Executive, as, for example, the Immigration laws. "Someone has said —'let me make the songs of a people and I care not who makes their laws..' I say 'let anybody make the laws, but let me do the construing of them.'"

We cannot follow Mr. Taft further in his exposition of the powers of the President, nor can we enumerate the many points in which he confessed the Constitution could be improved, all leaning in favour of approximating to the British system. Indeed such suggestions of change in the Constitution of the United States are to a large extent necessarily academic for has not Mr. Woodrow Wilson told us, in his Congressional Government (p. 242) that—'No impulse short of the impulse of self-preservation, no force less than the force of revolution can nowadays be expected to move the cumbrous machinery of formal amendment of the Constitution of the United States.' But in the main Mr. Taft is well content with what he called "our wonderful Constitution;"

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he regards it as a "happy result reached between two extremes; a triumph in the compromises it embodied." "We are in an age of iconoclasm, and I don't want to tinker with that instrument, especially as there are a lot of reformers about who don't know where they are going, but are on the way."

It has been impossible to reproduce in this Article a tythe of the *bon mots* and good stories with which Mr. Taft enlivened his discourses. Such as his remark about "Uncle Joe Cannon," the Chairman of the Appropriations Committee of Congress,—that he was "the most faithful watchdog with the most profane bark that ever existed." Or his observation that—"Men differ, but husbands are all alike. Politicians and Congressmen differ likewise, but Opposition Congressmen are all alike." But two of his stories were too good to be permitted to perish. Colonel Roosevelt, it appears, has during the last year published some Articles,—"material for a possible autobiography"—in which he divides the Presidents of the United States into 'Lincoln' Presidents, and 'Buchanan' Presidents. "He put himself among the 'Lincoln' Presidents; and he put me among the 'Buchanan' Presidents. It reminds me,"—with the fascinating little chuckle which proclaims a good thing coming,—"of Joe Davis' little girl. Davis' little girl came home, and ran up to him and said—'Poppa, I'm the best scholar in the class.' Joe's parental bosom swelled with pride, and he said —'I'm glad of that. Did the school teacher tell you that?' 'No, said the little girl, 'teacher didn't tell me that: I noticed it myself.'"

The other related to a lady who came to see Mr. Taft when War Secretary, and asked him to get her son into West Point. "But I said, Madame, I can't do that. We leave that to the officers in charge of the Institution. 'But' she said, 'he passed his examinations: but failed in his medical, because he was one inch too short round the chest.' 'Well, Madame,' I said, 'if he's clever enough to pass the examination, he can easily add an inch to his chest measurement. I've had no difficulty about that.' She listened to me with the impatience married men will quite understand, and said —'well I want you to send for the papers.' So I said I'd send for the papers. She was a very attractive woman. So I sent for the papers, and found that instead of merely

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scraping through as I expected, he had passed an extraordinarily good examination. He had got 95% of full marks. So I sent for the lady again, and when she came, I said,—'Well, Madame, I'm going to let your son through.' And she said—'You're going to let him through!' and her face grew rosey all over; and she looked more attractive than ever; and she came close up to me and said: 'Mr. Taft you're not *nearly* as fat as they say you are.'"

We hope that the University will publish these valuable lectures in full.

A. H. F. LEFROY.

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THE CASE OF THE WILHELMINA.

On the 22nd of January last the steamship "Wilhelmina" sailed from New York bound for Hamburg with a cargo of 900,000 pounds of wheat, 840,000 of corn, and 450,000 of bran, and a quantity of lard, beef, pork, hams, pickled tongues, dried fruit, peas, beans and oats. The goods were shipped by the W. L. Green Commission Company of St. Louis, which had chartered the vessel from the Southern Products Trading Company. The consignee was an American citizen in Germany.

The Wilhelmina was an American owned vessel flying the American flag, and therefore unlike the Dacia [1] it was not subject to seizure except by reason of the nature and destination of its cargo. It is said that it was the first American vessel carrying a cargo of foodstuffs to leave an American port for a German port since the commencement of the present war, and it raised the question as to the circumstances in which foodstuffs may be considered contraband. In the event the case of the Wilhelmina has become of outstanding importance, not merely because of the principle which its detention involved, but because it afforded one of the pretexts for, or was one of the causes contributing to, the German declaration of a so-called "war zone."

In order to consider the applicability to foodstuffs of the doctrine of contraband it is necessary to bear in mind some elementary distinctions.

Citizens of a neutral nation have the right, subject to certain limitations, to carry on trade with the belligerent nations and their citizens, notwithstanding the existence of a state of war. This right does not, however, include the right to fit out any vessel to cruise or commit hostilities in foreign service against a nation with which the neutral nation is at peace, or to do any acts which will constitute a breach of neutrality on the part of the neutral nation. Such acts are generally punishable under the municipal law of the neutral nation.

A neutral nation is not under any obligation to restrain its citizens from supplying goods to a belligerent nation or its citizens, and the neutral nation is justified in protecting its citizens against any unwarrantable interference with their

[1] See the Canadian Law Times for February.

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trade. The right of neutral citizens to receive the protection of their own Government does not, however, extend (1) to contraband of war, or (2) to goods in course of transit by sea to a blockaded port. In these two cases the rights of belligerents override the rights of neutrals. The neutral citizens carry on trade at their own risk, and cannot complain if their cargoes, and in some cases their ships, are confiscated by a belligerent. They are not subject to interference by their own Government, and they are on the other hand not entitled to its protection unless in any respect the belligerent has exceeded its rights.

Obviously it is in the interest of a belligerent nation which has the command of the sea to extend, and it is in the interest of a neutral nation or of a belligerent nation which is unable to protect its own seaborne commerce, to limit, the category of goods which may be treated as contraband of war. In the absence of agreement between the nations, a belligerent in the first instance declares what goods it intends to treat as contraband. Whether a particular capture is justified will be decided by its prize Courts. A neutral nation may make a diplomatic protest against the principles underlying the belligerent declaration as to contraband;[2] it may protest against the manner in which the belligerent exercises its necessary right of stopping and searching neutral ships;[3] or it may protest against a particular prize court decision. In the last resort the only method a neutral nation has of enforcing its protest is by making war. In practice, however, such protests are frequent; they are usually susceptible of adjustment, and they do not lead to war. A belligerent nation cannot afford utterly to disregard the general principles governing contraband which have been evolved in the past because it can be confronted with its own contentions as a neutral in past wars, and it may be desirous in some future war of asserting neutral rights.

Theoretically, all goods may be divided into three classes: (1) Articles exclusively or chiefly useful for war; (2) Articles susceptible of use in war as well as for peaceful purposes; and (3) Articles not susceptible of use in war. Articles of the first class are designated absolute contraband,

[2] As Great Britain and the United States did in the Russo-Japanese war and as Germany did in the present war.
[3] As the United States did in the present war.

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those of the second class conditional contraband. Those of the third class are non-contraband. The practical difficulty is to determine what articles properly fall within each class, and the belligerent which has the command of the sea naturally seeks to extend the scope of the first class at the expense of the other classes. The chief advantage from such belligerent's point of view in treating an article as absolute instead of conditional contraband, is that absolute contraband is liable to capture if it is in course of carriage to an enemy country without proof that it is to be used by the naval or military forces of the enemy, (because the article by its nature is useful chiefly or only for war). In the case of conditional contraband which is susceptible of peaceful use as well as of use for war, some evidence is required that the goods in question are intended to be used for war, and it is especially as to the nature of the evidence required of intended use for war that a great deal of difference of opinion has existed in the past.

In 1797 during war between Great Britain and France, the Jonge Margaretha, a Papenberg ship, was captured by the British on a voyage from Amsterdam to Brest with a cargo of Dutch cheeses. There was at the time in the port of Brest a considerable French fleet which was engaged in preparing for a hostile expedition against Great Britain, and which was being watched by a British fleet, then lying off the harbour for the purpose of defeating its designs. The cheeses were of a kind used on French and British ships of war. Sir William Scott (afterwards Lord Stowell) condemned the cargo, but, in view of special circumstances, ordered the ship to be restored.[4] After giving instances in which provisions of various kinds had been treated as contraband when intended for military or naval use, the learned judge said:—"I take the modern established rule to be this, that generally they are not contraband, but may become so under circumstances arising out of the particular situation of the war or the condition of the parties engaged in it." In the case in question the articles were not products of the country exporting them, they were not goods in an unmanufactured state, but on the contrary were in a condition suitable for immediate military use, and, most important of all, they had a highly probable military destination because

[4] 1799, 1 C. Rob. 189; 1 Roscoe Prize Cases 100.

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Brest was primarily, not a commercial port, but a port of naval or military equipment.

The Jonge Margaretha was followed in the United States in The Commercen,[5] in which it was held, during war between Great Britain and the United States, that a cargo of barley and oats on board a Swedish vessel bound for Bilbao, but intended for the use of the British forces in Spain, was liable to seizure as contraband. In each of the cases just cited the decision seems to have been justified by the evidence as to the probable military destination of the goods, without having recourse to the broader doctrine, expressed by Sir William Scott in The Jonge Margaretha, that provisions or other articles *ancipitis usus* might become contraband in circumstances arising out of the particular situation of the war or the condition of the parties engaged in it. This doctrine was applied to an extreme degree by the British government in 1793 and 1795 during the French Revolutionary wars. Notwithstanding the protests of neutral powers the British Government claimed the right to detain all vessels laden wholly or in part with grain, flour or meal, bound to any port in France or any port occupied by the armies of France. The justification alleged was that the law of nations permitted the seizure of provisions if "the depriving an enemy of these supplies is one of the means intended to be employed for reducing him to reasonable terms of peace," especially where, as in the then war, "almost the whole labouring class" of the enemy nation had been armed "for the purpose of commencing and supporting hostilities," and where the trade in provisions was in a great measure carried on by the enemy Government.[6]

In more recent times the doctrine of conditional contraband has usually been stated in a narrower way than in The Jonge Margaretha, and it has been said that it must be shown that the goods are intended either for the enemy's naval or military forces, or for a port used exclusively or mainly as a port of naval or military equipment belonging to or occupied by the enemy.[7] Great Britain, both as a belligerent and as a neutral, has upheld the narrower doctrine, which as already pointed out, is consistent with the actual decisions in The Jonge Margaretha and The Commercen.

[5] 1816, 1 Wheat. 382.
[6] Moore, International Law Digest, vol. 7, pp. 676-7, 680.
[7] Cobbett, *op. cit.* pp. 423, 424, 426.

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The following statement made by Lord Salisbury in 1900 during the South African war has been much quoted lately. "Foodstuffs, with a hostile destination, can be considered as contraband of war only if they are supplies for the enemy forces; it is not sufficient that they are capable of being so used; it must be shown that this was in fact their destination at the time of the seizure." [8]

On the other hand, while Continental opinion was as a rule opposed to the British and American doctrine of conditional contraband as being unduly oppressive to neutrals, some European States as belligerents have endeavoured to apply to foodstuffs rules of contraband of greater severity. In 1885 France during war with China, claimed to treat rice bound for Chinese ports north of Canton as contraband, by reason of "the importance of rice in the feeding of the Chinese population." Great Britain refused to admit the right to seize rice in such a case unless it was in course of carriage to Chinese camps or places of naval or military equipment; [9] on the other hand when the Kiel Chamber of Commerce applied to the German Government for a statement of the latter's views on the subject, Bismarck said: "In answer to their representation of the first instant, I reply to the Chamber of Commerce that any disadvantage our commercial and carrying interests may suffer by the treatment of rice as contraband of war, does not justify our opposing a measure which it has been thought fit to take in carrying on a foreign war. Every war is a great calamity, which entails evil consequences not only on the combatants, but also on neutrals. These evils may easily be increased by the interference of a neutral power with the way in which a third carries on the war, to the disadvantage of the subjects of the interfering power, and by this means German commerce might be weighted with far heavier losses than a transitory prohibition of the rice trade in Chinese waters. The measure in question has for its object the shortening of the war by increasing the difficulties of the enemy, and is a justifiable step in war if impartially enforced against all neutral ships." [10] No opportunity was

[8] The statement was made in the course of correspondence arising out of the arrest of certain ships chiefly laden with foodstuffs bound for Delagoa Bay. See Moore, *op. cit.*, vol. 7, p. 685.

[9] Cobbett, *op. cit.*, vol. 2, p. 424; cf. Moore, *op. cit.*, vol. 7, p. 680.

[10] Quoted in the British answer, Feb. 10th, 1915, to the American note of Dec. 28th, 1914.

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afforded for learning whether the French prize courts would have upheld the views of their Government, as no seizure was made during the short remainder of the war; shipments of rice, it would seem, were entirely stopped by fear of capture.[11]

In 1904 during the war between Russia and Japan the Russian Government published a list of contraband without making any distinction between absolute and conditional contraband. One item of this list included rice and provisions generally. The British Government addressed a protest to the Russian Government on the ground that these articles could not, in accordance with international law, be treated as unconditional contraband, and that they could be made liable to capture only if they were intended for the military or naval use of the enemy. The United States subsequently made a similar protest, and ultimately the Russian Government reconsidered the question, and issued a memorandum that rice and foodstuffs should be considered contraband of war if they were destined for the enemy Government, its administration, its army, its navy, its fortresses, its naval ports, or its purveyors, but should not be considered contraband if addressed to private individuals.[12]

In the Declaration of London, 1909, foodstuffs are mentioned in the list of conditional contraband, and the circumstances in which conditional contraband is liable to capture are defined in its following articles:—

ARTICLE 33.

"Conditional contraband is liable to capture if it is shown to be destined for the use of the armed forces or of a government department of the enemy State, unless in this latter case the circumstances show that the goods cannot in fact be used for the purposes of the war in progress. This latter exception does not apply to a consignment coming under Article 24 (4)," (*i.e.*, to gold or silver in coin or bullion or to paper money).

ARTICLE 34.

"The destination referred to in Article 33 is presumed to exist if the goods are consigned to enemy authorities, or

[11] Moore, *op. cit.*, vol. 7, p. 681.

[12] For accounts of this controversy see Cobbett, *op. cit.*, vol. 2, pp. 432 ff; Hershey, International Law and Diplomacy of the Russo-Japanese War, pp. 160-187; Moore, *op. cit.*, vol. 7, pp. 686 ff.

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to a contractor established in the enemy country who, as a matter of common knowledge, supplies articles of this kind to the enemy. A similar presumption arises if the goods are consigned to a fortified place belonging to the enemy, or other place serving as a base for the armed forces of the enemy. No such presumption, however, arises in the case of a merchant vessel bound for one of these places if it is sought to prove that she herself is contraband. In cases where the above presumptions do not arise, the destination is presumed to be innocent. The presumptions set up by this Article may be rebutted."

ARTICLE 35.

"Conditional contraband is not liable to capture, except when found on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and when it is not to be discharged in an intervening neutral port. The ship's papers are conclusive proof both as to the voyage on which the vessel is engaged and as to the port of discharge of the goods, unless she is found clearly out of the course indicated by her papers, and unable to give adequate reasons to justify such deviation."

The most serious ambiguity in these Articles is as to the meaning of "place serving as a base for the armed forces of the enemy." This phrase may mean a place of naval or military equipment where armed forces are collected, prepared and despatched, but may also be interpreted as including a "base of supply," in which case it would cover all ports and cities from which supplies are obtained for the use of military or naval forces.[13] In the report of the drafting committee of the London Naval Conference the phrase is amplified as a "place used as a base, whether of operations or of supply, for the armed forces of the enemy," and thus countenance is given to a wide rather than a narrow construction of the words used in the Declaration.

The Declaration of London has never been ratified by the nations engaged in the present war, and is therefore, not binding on them, but on August 20th, 1914, a British order

[13] Cf. Cobbett, *op. cit.*, vol. 2, p. 443: Bentwich, Declaration of London, 73.

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in council was passed declaring that, subject to certain additions and modifications[14] the Declaration should be adopted as if it had been ratified by His Majesty. The additions included the following: "(3) The destination referred to in Article 33 may be inferred from any sufficient evidence, and (in addition to the presumption laid down in article 34) shall be presumed to exist if the goods are consigned to or for an agent of the enemy State, or to or for a merchant or other person under the control of the authorities of the enemy State."

"(5) Notwithstanding the provisions of article 35, conditional contraband if shown to have the destination referred to in Article 33, is liable to capture to whatever port the vessel is bound and at whatever port the cargo is to be discharged."

Paragraph (3) was designed to obviate the difficulty of proving that goods consigned to an individual subject of the enemy were really intended for the use of the armed forces of the enemy, while the effect of paragraph (5) was to make applicable to conditional contraband the doctrine of "continuous voyage," (that is to say, a cargo which was to be discharged in a neutral port might be seized if it was intended to be forwarded by sea or land from the neutral port to the enemy), although by the Declaration the application of this doctrine was confined to absolute contraband.

These variations were objected to by the United States as being contrary to the generally recognized principles of international law and as inflicting unnecessary hardship upon neutral commerce. As a result a new order in council was passed on October 29th, 1914, by which a greater measure of immunity was conferred on neutral commerce. The paragraphs above quoted of the order of August 20th were on October 29th, 1914, replaced by the following:—

"(2) The destination referred to in Article 33 shall (in addition to the presumptions laid down in Article 34) be presumed to exist if the goods are consigned to or for an agent of the enemy State."

"(3) Notwithstanding the provisions of Article 35, conditional contraband shall be liable to capture on board a

[14] The British Government had already on the 4th of August, published a contraband list differing in some respects from those contained in the Declaration of London, and at later dates published new lists. In the Declaration of London as well as in the various British lists, "foodstuffs" are classed as conditional contraband.

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vessel bound for a neutral port if the goods are consigned "to order," or if the ship's papers do not show who is the consignee, or if they show a consignee of the goods in territory belonging to or occupied by the enemy."

"(4) In the cases covered by the preceding paragraph (3) it shall lie upon the owners of the goods to prove that their destination was innocent."

Paragraph (2) modified very greatly the presumption created by the earlier order because the earlier order had, in effect, provided that goods consigned to any person *under the control* of the authorities of the enemy State should be presumed to be destined for the use of the armed forces of the enemy, and therefore liable to capture, and it might be plausibly contended that any person in enemy territory was under the control of the authorities of the enemy State. Paragraph (3) of the later order also effected an important modification because by it the doctrine of continuous voyage was confined to cases where the consignee was a person in enemy territory, or where the consignor did not disclose the identity of the consignee.[15]

All the British modifications of and additions to the Declaration of London were made the subject of a protest lodged by Germany with the United States. The United States had already suggested to the various belligerents the adoption of the Declaration as a temporary code of naval warfare in the present war, but withdrew this suggestion owing to the failure of some of the belligerents to adopt the Declaration without modification.

In the case of the Wilhelmina the British Government is, of course, not under the necessity of invoking the doctrine of continuous voyage, because the ship was bound for the enemy port of Hamburg, and the question was whether, in the circumstances, there was justification for seizing a cargo of foodstuffs consigned to a private individual in enemy territory. The ship sailed from New York on January 22nd,

[15] See the British answer, February 10th, 1915 (New York Times, February 18th, 1915), to the protest of the United States, December 28th, 1914. It is hardly necessary to point out that in time of peace the consignment of goods to the order of the consignor or his agent is a usual and perfectly innocent practice, designed to preserve the consignor's control over the goods until the purchase price is paid. During war, however, the practice is open to abuse for the purpose of concealing a hostile destination, and it seems reasonable that the convenience of the neutral should in this respect yield to the exigencies of the belligerent.

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and early in February, owing to injuries sustained in a storm, was obliged to take refuge in the English port of Falmouth for repairs.

In the meantime, while the Wilhelmina was at sea, by a decree dated January 25th, 1915, the German Federal Council had ordered the seizure on the first of February of all supplies within the German Empire of wheat and various other grains and of flour, and had placed the administration of such supplies in the hands of certain governmental associations or bureaus.[16] By Article 45 of this decree an exception was made in favour of grain and flour imported from foreign countries after January 31st, but it was provided that "The grain and flour imported from foreign countries may be delivered by the importer only to the War Grain Association Limited, to the Central Purchasing Association Limited, or to the Communal Associations."

The insertion in the decree of the words just quoted was of course a tactical error on the part of the German Government. It strengthened very much the British contention that the cargo of the Wilhelmina was liable to seizure, because the goods would necessarily be delivered to the German Government or its agent for distribution. Realizing its mistake, the German Federal Council on February 6th repealed the words in question,—apparently with the object of rendering the detention of the Wilhelmina more difficult, The British Government, in ignorance of the repeal, ordered the detention of the ship. Various assurances were given on behalf of the German Government that this cargo, or other food products imported from the United States, would not be used by the German Government, its administrative bodies or its armed forces. Great Britain, however, adhered to its intention of bringing the cargo before a prize court, and on February 19th handed to the American Ambassador in London a reasoned statement of its attitude.

In this statement, the British Government pointed out that the German Government's seizure of grain and flour was not the only ground on which the detention of the cargo was justified. *Inter alia*, Germany had justified the bombardment of open towns and watering places on the ground that they were fortified towns and bases, and had sunk a neutral ship with a cargo of grain consigned to Dublin and

[16] A translation of the complete text of the decree was published in the New York Times, February 21st, 1915.

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Belfast. *A fortiori,* the British Government was entitled to treat Hamburg, which is in part protected by fortifications at the mouth of the Elbe, as a fortified town and a base of operations and supply for the purpose of Article 34 of the Declaration of London.

In its earlier note of the 10th of February, already mentioned, in answer to the United States protest, the British Government had raised the broader question whether the principle that a belligerent should abstain from interference with foodstuffs intended for the civil population of the enemy—a principle constantly upheld by Great Britain in modern times—could be considered as a binding rule of international law in the circumstances of the present war. In the first place Germany had in the past repudiated the principle as evidenced by the statement of Bismarck in 1885, already quoted, and there was no certainty that she would respect the principle now. In the next place, the reason for drawing a distinction between foodstuffs intended for the civil population and those intended for the armed forces disappears when the distinction between the civil population and the armed forces disappears. In view of the tremendous organization for war now existing in Germany, there is no clear distinction between those whom the Government is responsible for feeding, and those whom it is not, and however, much goods may be imported for civil use, it is by the armed forces that they will be consumed if military exigencies require it.

In its statement of February 19th, the British Government also pointed out that it had hitherto refrained from interfering with neutral ships carrying foodstuffs not destined for the enemy Government or the enemy forces, and that it had acted on the general principle of late universally upheld by civilized nations that the civil population of belligerent nations is not to be exposed to treatment rightly reserved for combatants. As, however, Germany had adopted a method of warfare which involved the slaughter of non-combatants, including women and children, Great Britain and her allies might be obliged to declare foodstuffs absolute contraband and take other measures for interfering with German trade by way of reprisal.

Germany, having made an unsuccessful effort to drive a bargain with Great Britain whereby the shipment of foodstuffs to Germany should not be interfered with, and in

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return Germany should refrain from further submarine war on merchant vessels, is now carrying out to the best of its ability its piratical policy, destroying merchant vessels without warning—for necessity knows no law—and incidentally, killing non-combatants. It is not necessary in connection with the case of the Wilhelmina to discuss the measures to be adopted by the allies by way of retaliation. firstly, because they will probably not apply to neutral shipments made before the notification of such measures, and secondly, because under them foodstuffs intended for Germany will probably be seized without regard to the principles applicable to conditional contraband which have been the main subject of this article.

JOHN DELATRE FALCONBRIDGE.

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CURRENT COMMENTARY UPON ENGLISH AND CANADIAN DECISIONS.

English Decisions.

We notice that, in the *Law Quarterly Review* for January, Sir F. Pollock comments on *Nocton* v. *Lord Ashburton*,[1] to which we called special attention in our last number. We quote the following from his remarks: "A duty of giving information or advice, or both with diligence as well as in good faith, may be incident in equity, at any rate, to a fiduciary relation, such as that of a solicitor to his client. Loss incurred through a breach of this kind of duty is a ground of equitable relief, whether or not it might also be a ground of action at common law. The right to such relief is not affected by the decision or the *ratio decidendi* in *Derry* v. *Peek*, and this is not the less so because the breach of these special fiduciary duties was called 'constructive fraud' in the days when equity practitioners used the word Fraud as *nomen generalissimum*. This is now laid down by the House of Lords in *Nocton* v. *Lord Ashburton*. Looking to the common sense of the question, it seems that constructive fraud is, or was, so called just because it was not actual fraud. So 'constructive notice' means that something far short of actual notice has like effects given to it; 'constructive possession' is the state of a man who does not possess but is allowed the rights of a possessor or some of them; and 'constructive delivery' is something different from physical transfer of goods but allowed to have the like legal operation. Therefore a rule of law making wilful falsehood or at least conscious disregard of truth a necessary element in actual fraud is not, on the face of it, applicable to the various breaches of duty which for historical reasons have been gathered under the catchword of 'constructive notice.' The attitude of equity in these matters may be illustrated by the recent Oxford story of a proctor who, after hearing an undergraduate's full and ingenious explanation, replied, 'Very well, sir, I am bound to accept your word—but I shall act as if I did not.'

The effect of such judgments as that of the Judicial Committee of January 20th last, a copy of which is before

[1] [1914] A. C. 932, 83 L. J. Ch. 784.

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us, upon just and sensible people, will not be to make them abuse the Privy Council, which is about as much affected by any prejudice for or against corporations as the adding machine in a bank; rather it will be to make them more careful in the wording of statutes and agreements. The Board has overruled the decision of our Provincial Supreme Court, which affirmed the order of the Railway and Municipal Board. The whole case turned upon the proper construction of a clause in a statute, and of a clause in an agreement. The statute provides that whenever in the opinion of the Ontario Railway and Municipal Board repairs or improvements to or changes in any tracks, switches, terminals, or terminal facilities of any railway company subject to provincial jurisdiction, ought reasonably to be made in order to promote the security or convenience of the public, the Board may make orders directing such repairs or improvements to be made. Their lordships decline to hold, with the Supreme Court, that the word 'tracks' includes all that part of any roadway occupied by the railway in question. They think that the words occurring later in the same section—'in or in connection with the transportation of passengers, freight, or property'—indicate a interpretation of a more restricted and literal kind, and exclude from the power given by the section the general roadway itself, as distinguished from the rails, etc., laid upon it. The clause in the agreement, which was the other matter in question, bound the railway company to 'keep clean and in proper repair that portion of the travelled road between the rails and for eighteen inches on each side of the rail or rails lying on or being next to the travelled road.' Their lordships decline to hold that under this clause the company bound themselves to change the condition of the portion of the roadway assigned to them so as to make it correspond with an improved condition in which the balance of the road had been put by the municipality, the other party to the agreement. "It is one thing," they say, "to undertake to keep what is handed over in proper repair on the footing of maintaining it in the state into which it has been put, and quite a different thing to interpret any agreement 'to keep clean and in proper repair' as imposing an obligation to lay a new pavement of a kind which did not exist, and was not provided for when the agreement was originally entered

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into, merely because the municipal authorities have themselves thought it right to improve the remainder of the roadway."

Judgment has now been given in the great cases respecting Aliens in war time under the law of England, to the argument of which before the Lord Chief Justice of England, the Master of the Rolls, and Lord Justices Buckley, Kennedy, Swinfen Eady, Phillimore and Pickford, we called attention in our February number. We make this note of the points decided from the report in the Times of January 20th, on which day judgment was given. It is probably the first time that the subject has been examined, in a appellate tribunal in all its aspects. The judgment of the full Court in these cases decided: (1) That in English law 'alien enemy,' when the term is used in reference to civil rights, by no means imports, as might be supposed, merely a subject of enemy nationality, that is, of a State at war with the king, nor does it exclude in all cases a subject of a neutral state or of the British Crown. The test of whether a man is an alien enemy is not nationality, but the place of carrying on business. Ever since Lord Stowell's judgment in the great case of The Hoop in 1799, the law has been firmly established that one of the consequences of war is the absolute interdiction of all commercial intercourse or correspondence by a British subject with the inhabitants of the hostile country except by permission of the Sovereign. In the light of this rule, when considering the enforcement of civil rights, a person may be treated as the subject of a enemy State notwithstanding that he is in fact a subject of the British Crown or of a neutral State. Conversely, a person may be treated as a subject of the Crown, notwithstanding that he is in fact the subject of an enemy State. So that Professor Dicey in his Treatise on Parties to an Action states the law accurately, when he says: 'Under the term alien enemies are included not only the subjects of any State at war with us, but also any British subjects or the subjects of any neutral State *voluntarily* resident in a hostile Country.'

(2) In ascertaining the rights of aliens, the first point for consideration is whether they are alien friends or alien enemies. Alien friends have long been and are now treated in reference to civil rights as if they were British subjects, and are entitled to the enjoyment of all personal rights of

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a citizen, including the right to sue in the King's Courts. Alien enemies have no civil rights or privileges, unless they are here under the protection and by permission of the Crown. The subject of an enemy State who has been registered under the Aliens Restriction Act 1914 as an alien and the subject of an enemy State is entitled to sue in the King's Courts, because such an alien is resident in England by tacit permission of the Crown. He has by registration informed the Executive of his presence in the country and has been allowed thereafter to remain in the country. He is *sub protectione domini regis.*

(3) Such is the common law of England and the provision in The Hague Convention of 1907 on the Laws and Customs of War, by which it is forbidden 'to declare abolished, suspended, or inadmissible the right of the subjects of the hostile party to institute legal proceedings' has no bearing on the matter. The effect of this paragraph is not to abrogate the old rule, not peculiar to English law, that an alien enemy's rights of action are suspended during war. What it forbids is a *declaration.* This has no application to a country in which, as in England, there is no room for a declaration. By the existing law of the country the mere fact of war operates *ipso facto* to suspend any rights of action which at the time of the outbreak of war any alien enemy may possess. In fact viewing the paragraph of the Hague Convention in the light of its context, it becomes clear that it is to be read as forbidding any declaration by the military commander of a belligerent force in the occupation of the enemy's territory which will prevent the inhabitants of that territory from using their Courts of law in order to assert or to protect their civil rights; as, for example, if the commander-in-chief of the German forces which are at the present moment in military occupation of part of Belgium were to declare that Belgian subjects should not have a right to sue in the Courts of Belgium, he would be acting in contravention of the terms of the paragraph. It is satisfactory to read that as far back as March 27th, 1911, the British Foreign Office, in a letter to Professor Oppenheim of Cambridge, in answer to enquiries made by him, made a powerfully reasoned exposition of the view that the paragraph of the Hague Convention in question has no concern with the municipal law, but relates to the conduct of those who are in command of an army in occupation of the territory of an enemy.

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(4) But an alien enemy remains during the war liable to be sued in the King's Courts. To allow an alien enemy to sue or proceed during war in the civil Courts of the King would be, as we have seen, to give to the enemy the advantage of enforcing his rights by the assistance of the king with whom he is at war. But to allow the enemy to be sued or proceeded against during war is to permit subjects of the king or alien friends to enforce their rights with the assistance of the king against the enemy.

(5) Once the conclusion is reached that an alien enemy can be sued it follows that he can appear and be heard in his defence, and may take all such steps as may be deemed necessary for the proper presentment of his defence. If he is brought at the suit of a party before a Court of Justice he must have the right of submitting his answer to the Court. To deny him that right would be to deny him justice and would be quite contrary to the basic principles guiding the King's Courts in the administration of justice.

(6) So, again, when sued, if judgment proceed against him, the Appellate Courts are as much open to an alien enemy as to any other defendant, for, if he is entitled to have his case decided according to law, and if the judge in one of the King's Courts has erroneously adjudicated upon it, he is entitled to have recourse to another and an Appellate Court to have the error rectified.

(7) There remains the question of the position in respect to rights of appeal of an alien enemy plaintiff, who before the outbreak of war was a plaintiff in a suit, in which he failed, and then by virtue of his residence or place of business became an alien enemy. The Court decides that an alien enemy in that position has no right of appeal; and that there is no destruction in principle between the case of an alien enemy seeking the assistance of the King to enforce a civil right in a Court of first instance, and an alien enemy seeking to enforce such right by recourse to the Appellate Courts. He is in either case seeking to enforce his right by invoking the assistance of the King in his Courts.

Coincidently with the above very important judgment the same Court, with the exception of Lord Justice Kennedy, who had died, and Lord Justice Swinfen Eady, decided in *Continental Tyre and Rubber Company* v. *Daimler Company*.

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reported in the same *Times*, that an action could be maintained notwithstanding the war, by a company registered and carrying on business in England with a registered office therein, although its shareholders were all alien enemies, with the exception of one person holding a single share, who is not treated as a relevant fact at all. Their lordships say:—"It cannot be disputed that the plaintiff company is an entity created by statute. At the outbreak of war, it was carrying on business in the United Kingdom, it had contracted to supply goods, it delivered them, and until the outbreak of the war was admittedly entitled to receive payment at the due dates. Has the character of the company changed because on the outbreak of war all the shareholders and directors resided in an enemy country and therefore became alien enemies? An English company cannot by reason of these facts cease to be an English company. It is undoubtedly the policy of the law as administered in our Courts to regard substance and to disregard form. But substance must not be treated as form, or swept aside as technicality, because that course might appear convenient in a particular case. The fallacy of the appellants' contention lies in the suggestion that the entity created by statute is or can be treated during the war as a mere form or technicality by reason of the enemy character of its shareholders and directors." And so the Court came to the conclusion that payment to the plaintiff company was not payment to the alien enemy shareholders or for their benefit. Buckley, L.J., delivered a dissenting judgment; and he urged that if the law was, as it must be assumed to be, what the rest decided, the matter was one which called urgently for legislation. He very pertinently asks whether, if it were the law to allow a sole person to incorporate himself as a company with limited liability, and an individual German resident in Germany became incorporated here as a British company, it could be seriously contended that in time of war that alien enemy, because he had acquired a legal corporate name, and had an artificial legal existence in this country, was subsequently, for the purpose of maintaining an action in an English Court, not an alien enemy.

One more recently reported English case invites special notice. It is the case of *Herd* v. *Weardale Steel, Coal, and Coke Company*,[2] in the House of Lords. The material facts

[2] 84 L. J. K. B. 121, [1915] A. C. 67.

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were, as follows. The plaintiff, who was a hewer employed at the Thornley Colliery in the County of Durham, descended the mine, about 9.30 a.m. on May 30th, 1911, with the intention of working. The shift in which he was one of the workmen would not normally have come to an end until about 4 p.m. The only means of access to or egress from the mine was by the cages in the shaft, one ascending and the other descending. The cages were used for the conveyance of workmen and coal, but when being used for coal workmen were not allowed to enter them, and *vice versa*. After descending the mine according to the practice, the appellant and two other men were directed by a man, called the deputy overman, to do certain work. The plaintiff and the two other men believing that the work was unsafe and that the direction was in breach of an agreement which had been entered into between a representative of the men and the manager of the colliery, refused to do the work, and at about 11 a.m. the plaintiff, and the said two other men, and twenty-nine other men acting in sympathy with them, requested the defendant Turner, an overman at the colliery, to allow them to ascend the shaft by means of the cage as they desired to leave the mine, but Turner told them that he had orders to prevent them from going. There were several occasions on which the cage came down during the morning, but on many of these occasions it was being used for the purpose of hoisting coal. Ultimately permission was given to the men to go up, and the cage was then raised to the surface with the men in it. The plaintiff brought this action against the Company and Turner for false imprisonment; and the House of Lords now affirmed the Court of Appeal in dismissing it. All their lordships concur, upon the ground of *Volenti non fit injuria*. Thus Lord Haldane, L.C. says:—

"When a man goes down into a mine, from which access to the surface does not exist in the absence of special facilities given on the part of the owner of the mine, he is only entitled to the use of those facilities (subject possibly to exceptional circumstances) on the terms on which he has entered. I think it results from what was laid down by the Judicial Committee in *Robertson* v. *Balmain New Ferry Co.*,[3] that this is so. In that case there was a pier, and by the regulations a penny was to be paid by those who entered.

[3] 79 L. J. P. C. 84; [1910] A. C. 295.

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and a penny on getting out. The keeper of the exit gate refused to allow a man, who had gone in, having paid his penny, but had changed his mind about embarking on a steamer and wished to return, to come out without paying another penny. It was held that this was not false imprisonment. *Volenti non fit injuria.* The man had gone to the pier knowing that those were the terms and conditions as to exit, and it was not false imprisonment to hold him to conditions which he had accepted. So it is not false imprisonment to hold a man to the conditions, which he has accepted when he goes down a mine. The usage of the mine —a usage which I think must be taken to have been notified —was that the workman was to be brought up at the end of his shift. The man chose to go down to the bottom of the mine under these conditions—conditions which he accepted. He had no right to call upon his employers to make use of special machinery put there at their cost, and involving cost in its working, to bring him to the surface just when he pleased." Lord Moulton concurs, and closes his judgment with the words: "That a man should be bound to work machinery which is expensive to work, which is his, when he is under no contract to work it, at the bidding of a person who, not being entitled thereto by contract, wants to come up to the surface of the ground, and that if he does not do so he is guilty of false imprisonment, seems to me to be a proposition which has only to be stated to be rejected as being wholly contrary to that good sense on which English common law is based. I am of opinion, therefore, that this appeal should be dismissed with costs."

A. H. F. L.

CANADIAN DECISIONS.

The First Appellate Division has very recently dismissed an appeal from a judgment of Riddell, J., on a point in practice solicitors would do well to bear in mind. The case is that of *Leushner* v. *Linden*.[4] To a specially endorsed writ the defendant entered an appearance and an affidavit reading "I have a good defence to this action." It was

[4] 1914, 7 O. W. N. 456, 758.

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held that this was not a compliance with the rule which requires that the affidavit should contain (1) a statement that the defendant has a good defence *upon the merits;* and (2) the nature of the defence with its facts. The rule being specific, officers should not receive an affidavit which does not contain a statement that the defendant "has a good defence upon the merits." They are not expected to pass on the sufficiency of the facts but they should see that the affidavit is not defective in form. Riddell, J., affirmed with costs the judgment of the master setting aside the appearance and granting summary judgment.

In *Case Threshing Machine* v. *Gouley*[5] and *Johnson* v. *Cole*,[6] His Honour Judge Wood has given decisions on the rights of mortgagees and lienholders of a mare to its natural increase. In the first case it was held that a mortgage of a mare would include her foal until it was no longer nurtured by the mother, and this even in the absence of express provision in the mortgage that it was to include the increase. Whatever might be the effect of its omission, an express provision to this effect would mean that such increase was included even beyond the time the foals were being nurtured by the mother, and were consequently following the mother. After that time it would be a matter of identification. In the second case the purchaser gave the vendor a lien note to secure the purchase price of $340, the note being expressed to be given for "one white-faced mare, ten years, in foal." It was in the usual form and there was no express provision that it should cover the natural increase of the mare. It was held, following the case first mentioned, and the opinion expressed in Barron & O'Brien's Mortgages and Bills of Sale, 1914 ed., p. 35, that whether or not a mortgage or lien note extends to and includes the increase of the mortgaged mare beyond the time during which it is necessary for the colt to follow the mare for nurture depends upon whether or not there is an express provision to this effect in the instrument.

The case of *McIntosh* v. *Bank of New Brunswick*,[7] decided by the Supreme Court of New Brunswick goes far in limiting the law of agency as applied to a bank manager.

[5] 1914, 29 W. L. R. 811.
[6] 1915, 30 W. L. R. 290.
[7] 1914, 14 E. L. R. 420.

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There C. gave the plaintiff a cheque for $10,000 to pay a stock account with the plaintiffs. The account was in the names of one M. and the manager of the branch of the defendants' bank on which the cheque was drawn. At the time the cheque was given the manager told the plaintiffs the cheque was good, though it was not good, the account having been allowed to be overdrawn $13,000 by the manager acting in collusion with C. The next day the manager certified the cheque as "good when properly endorsed. H. B. C. ledger-keeper, Bank of New Brunswick, Market Branch." It was held that as the plaintiffs knew the manager was interested with M. in the stock account, they therefore knew he was not acting for the Bank in certifying the cheque, and that they were consequently put on strict inquiry as to his authority. The manager purported to act as ledger-keeper, but a ledger-keeper has no right to certify a cheque unless there are funds to meet it. Therefore, the defendants were not liable! At bottom it is perhaps a matter of fact. If the plaintiffs actually knew the manager was acting for himself and not for the bank the case would be simple.

A man and wife, married in Ontario, were by a decree of a Quebec Court on the suit of the husband granted a separation for acts of infidelity on the part of the wife committed when both parties were residing in Manitoba. The wife subsequently brought action against the husband for alimony on the ground that she was without means. At the time of this suit and of the separation decree both parties were residing in Quebec. It was held that the right of the wife to allowance depended on the law of Quebec, the defendant being within the jurisdiction; and that as marriage created certain legal obligations which did not cease under the Quebec code even though separation had been allowed for causes which in other jurisdictions disentitle the guilty party to alimony, the plaintiff could recover. *Church* v. *Hamilton*.[8]

We give herewith reports of six judgments delivered in the Supreme Court of Canada not yet reported elsewhere. The appeal of the City of Halifax in an action brought by one Tobin (47 N. S. R. 498) for damages was dismissed

[8] 1915, 21 R. J. 88.

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30th November. The corporation in laying a concrete sidewalk broke up a portion of an asphalt sidewalk crossing it and filled the hole made with earth and ashes. The rain washed away the filling and T. was injured by stepping into the hole. The corporation was held guilty of misfeasance.

In *Campbellford, etc., Rly. Co.* v. *Massie,* on appeal from the decision of the first Appellate Division of Ontario (reported 6 O. W. R. 161, 457), land had been expropriated for railway purposes. The railway company and the owner agreed to have the compensation determined by reference to three named persons called (in the submission), "valuers": their decision was to be binding and conclusive on both parties and not subject to appeal; they could view the property and call such witnesses and take such evidence, on oath or otherwise, as they, or a majority of them, might think proper; and either party could have a representative present at the view or taking of evidence, but his failure to attend for any reason would not affect the validity of the decision. It was held, Fitzpatrick, C.J., and Duff, J., dissenting, that this agreement did not provide for a judicial arbitration but for a valuation merely by the parties to whom the matter was referred, of the land expropriated. The agreement further provided that one valuator should be appointed by each party and a County Court judge should be the third; if one of those appointed would or could not act the party who appointed him could name a substitute; if it was the third who would or could not act the parties might agree on a substitute, in which case the decision of any two would be binding and conclusive without appeal; if they could not so agree a High Court judge could appoint. There was no necessity for substitution. It was held that the decision of any two of the valuators was valid and binding on the parties. The appeal was consequently dismissed with costs.

In *Grand Trunk Pacific Ry. Co.* v. *Pickering* a train crew of defendants while performing their duty in the transfer yard of another railway company were directed by the yardmaster to remove a special car of freight which was to be transferred to the defendants' railway from amongst a number of other cars placed in front of the car to be transferred. The train crew switched these cars to certain tracks

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on which there was then standing a train of the other railway company headed by an engine under which the fireman, plaintiff, was then working. They undertook to couple the cars which they were switching to the standing train, as a matter of convenience, and, in doing so, struck the rear of the train with such force as to move the engine and cause injuries to the fireman who was working under it. Specific questions were not submitted to the jury, notwithstanding suggestions made by defendants' counsel after the judge had charged them, and they returned a general verdict in favour of the plaintiff. It was held by the Supreme Court of Canada affirming the judgment appealed from (24 Man. R. 544), that in so proceeding to couple the cars to the standing train the defendants' train crew were still acting within the scope of their employment and, as they had performed the work in a negligent manner, the defendants were liable in damages for the injuries caused to the plaintiff. *Per* Anglin, J.—Counsel for defendants requested certain questions to be put to the jury only after the judge had charged the jury, and having regard to the scope and character of the questions suggested and to the judge's charge there was no miscarriage of justice resulting from the judge's failure to require the jury to answer specific questions. In charging the jury the judge made no reference to evidence by which it was attempted to shew that the plaintiff had been guilty of contributory negligence in disregarding an operating rule of the company by which he was employed respecting signals to be used on engines about which workmen were employed; no objection was taken to the charge on this ground nor was the judge asked to direct the attention of the jury to the rule. *Held per* Anglin, J.—There was no reason why the judgment appealed from should be disturbed on this ground. The appeal was dismissed with costs.

In *Canadian Northern Ontario Railway Company* v. *Smith*, an appeal from Quebec, two of the Court held that no appeal would lie on the ground that the case came within the rule in *C. P. R.* v. *Ste. Thérèse*. It appeared that a railway company had served notice of expropriation of land on the owner, offering $25,000 as compensation. It later served a copy of said notice on S., lessee of said land for a term of ten years. On application to a Superior Court

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judge for appointment of arbitrators S. claimed to be entitled to a separate notice and an independent hearing to determine his compensation. The judge so held and dismissed the application and his ruling was affirmed by the Court of King's Bench. The company sought to appeal to the Supreme Court of Canada. It was held, per Fitzpatrick, C.J., and Idington, J., following *Canadian Pacific Railway Co.* v. *Little Seminary of Ste. Therese*[9] and *St. Hilaire* v. *Lambert*[10] that the Superior Court judge was *persona designata* to hear such applications as the one made by the company; that the case, therefore, did not originate in a superior court and the appeal would not lie; and per Davies, Duff, Anglin and Brodeur, JJ., that there was nothing in the record to show that the amount in dispute was $2,000 or over, and as no attempt had been made to establish by affidavit that it was the appeal failed.

The judgment of the Quebec Court of King's Bench (Q. R. 23, K. B. 212) was reversed by the Supreme Court of Canada, 29th December, 1914, in *Lamontagne* v. *Quebec Railway, Light, Heat and Power Co.*, Davies, J. dissenting, and it was held that the remedy given by article 1056 of the Civil Code, in cases of *délit* and *quasi-délit*, was taken away in regard to the classes of persons enumerated in section 3 of the Quebec statute respecting compensation for injuries to workmen, (9 Edw. VII., chap. 66), by the limitation in section 15 of that statute, (now articles 7323 and 7335 of the Revised Statutes of Quebec, 1909); but the effect of these enactments was not to repeal the provisions of article 1056 C. C. with respect to ascendant relations who were only partially dependant for support on a deceased workman to whom the statute applied. Where no objection has been taken to the judge's charge to the jury at the trial and it does not appear that any substantial prejudice was thereby occasioned there should not be an order for a new trial under the provisions of articles 498 *et seq.* of the Code of Civil Procedure. The majority of the court considered that the amount of damages awarded by the jury was so grossly excessive that there should be a new trial and it was ordered accordingly unless the plaintiff agreed that the verdict should be reduced to an amount mentioned.

[9] (16 Can. S. C. R. 606.)
[10] (42 Can. S. C. R. 264.)

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The appeal of the Halton Brick Co. from the judgment for $3,000 damages given against it at the trial (*McNally* v. *Halton Brick Co.*,[11]) was dismissed by the Supreme Court with costs (29 Dec. 1914). M. an employee of the defendant company was engaged in wheeling bricks into a kiln where he had to hand or throw them to men engaged in piling. When the pile became high a quantity of the bricks fell on M. who was killed. In an action by his widow against the company it was proved that the floor of the kiln was very uneven and that planks used to brace the pile when it was high were not in place when the accident occurred. It was held that as it was shown that the managing director of the company was aware of the condition of the floor his knowledge was that of the company; on which ground, and because he had not directed the prop to be maintained, which the jury found was negligence, the company was liable.

L. D.

[11] 1914, 5 O. W. N. 693.)

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CURRENT LEGAL REVIEWS AND PERIODICALS.

A great man in the law is dead. The Right Honourable Arthur Cohen, K.C., has received a tribute at the hands of Mr. A. V. Dicey, in the January number of the *Law Quarterly Review*, such as few lawyers have ever elicited. *Laudari a viro laudato* is the highest distinction coveted by honourable men. 'He came as near as a man could to the ideal of an English lawyer,' says Mr. Dicey. Perhaps the most interesting point in Mr. Dicey's eloquent tribute is that he says of Mr. Cohen,—what fame records of Papinian, the most famous lawyer in all history,—that his integrity and high moral principle were as remarkable as his eminence in law. Probably it is seldom, if ever, that the highest order of intellectual ability is combined with insensibility to the beauty of integrity, and the repulsiveness of the reverse, or with a want of comprehension of the truth of the immortal words that it profiteth a man nothing, though he gain the whole world and lose his own soul. After quoting from an Article by Sir Frederick Pollock, published sometime ago, with regard to Mr. Cohen's reputation as a lawyer, that—

> 'One must go back for a parallel to names almost prehistoric to our younger lawyers. Cohen was the peer of Sergeant Maynard and Plowden, or, in a branch of the law remote from his own, the great conveyancers of the early nineteenth century,' Mr. Dicey says:—
>
> 'Turn now from Arthur Cohen's distinguished career as a consummate English lawyer to a certain greatness and magnanimity of character which won for him both the admiration and the affection of his friends. That he possessed high intellectual power was patent to anyone who traced the course of his life. He was a man who talked very little of himself, and was, I think, even more reserved in the expression of personal feeling than is, as a rule, an Englishman, and, above all, an English lawyer. Yet to friends who came to know him at all intimately, it became more manifest as years went on that Cohen was endowed not only with rare intellectual power, but with a singular greatness of heart and of soul. To say that as a barrister he lived up to the very highest standard of professional honour and integrity, is, so to speak,

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> to say nothing; for the same is, we may be thankful to feel, true of the vast majority of the men who make up the Bar of England. An honourable profession ought to be, and, in general, is practised by men of honour. . . . What I wish to emphasize is the possession by Cohen of a certain greatness of soul which cannot from the nature of things be possessed by the greater number of any profession whatever.'

Mr. Cohen receives a marked tribute also in the January number of the Journal of the Society of Comparative Legislation, where a great number of the important cases in which he was engaged,—not only before the Courts, but, also, before international tribunals—are mentioned; and also the fact that he is responsible for the Article on Insurance in Lord Halsbury's "Laws of England," and that this is the most complete written work Mr. Cohen has left to us. Words, also of a member of the Judicial Committee, before whom Cohen often appeared as advocate, are quoted, that:—

> "His characteristic as a lawyer was his strong instinct to find always a broad principle to govern the case in hand, and he generally succeeded; and I am not sure whether that is not really the difference between a great lawyer and a lesser one. That perhaps is part of the reason why his arguments before the Privy Council were so helpful, more so to me than those of any other man at the Bar. He will be a great loss."

Among the other Articles in this interesting number of the *Law Quarterly Review* are the first instalment of an elaborate enquiry by Mr. Holdsworth, into the 'Origin and Early History of Negotiable Instruments,' which we hope to notice more completely hereafter, and a paper on 'Intercourse with Alien Enemies' by Mr. T. Baty, in which he adduces evidence to shew that the rule as to the invalidity of contracts with the enemy, and the suspension or dissolution of contracts made prior to the event of war, is derived mainly, if not entirely, from the danger and impossibility of permitting intimate intercourse between the subjects of enemy States; and not from any abstract theory of individual hostility, nor (as mistakenly supposed in recent cases) on any imagined benefits of suppressing the enemy's trade, even when conducted with ourselves. He further suggests that

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in the complex circumstances of the modern world this intimacy of intercourse, in the great majority of transactions, no longer subsists; and arrives at the conclusion that, except in peculiar cases, where the interest and duty of a private individual would be brought into conflict, or when personal intercourse is still necessary, the prohibition of making and performing contracts with enemy persons is no longer, as a matter of policy, reasonable or maintainable.

Passing by a short Article on "The Origins of the Law of Sale" by Mr. Gilbert Stone, and a long Article concluding an elaborately learned enquiry into "The Origins of the English Bar" by Mr. Herman Cohen, we come to a very bold and interesting attack by Mr. T. Cyprian Williams on the recent judgments of the House of Lords in *Attenborough* v. *Solomon*.[1] In that case, it will be remembered that Moses Solomon had appointed his two sons J. D. Solomon and A. A. Solomon executors and trustees of his will, and had given his residuary estate to his trustees on trust for sale and division of the proceeds. The testator died in 1878, and within one year after his death all his funeral and testamentary expenses, debts, and legacies were paid, and the executors' residuary account sent in and passed. Part of the residuary estate consisted of certain articles of plate; and these remained in the sole custody of A. A. Solomon pending the final division of the estate. In the year 1892 A. A. Solomon pawned the plate with Messrs. Attenborough who were pawnbrokers, to secure £65 advanced by them to him for his own purposes; this pledge was made in his own name, and they had no notice that he was entitled to the plate as executor or trustee of his father's will and subject to the trusts of the will; and apparently they made no inquiry as to his title. A. A. Solomon died in 1907 and a new trustee of the will was appointed in his place; and in 1908 this new and surviving trustee brought an action in the Chancery Division against Messrs. Attenborough claiming to recover possession of the plate without paying the amount due to the pawnbrokers on the pledge. It was decided in the House of Lords, as a question of fact, that before the pledge was made, the executor had assented to the dispositions of the will, including the bequest of the testator's plate and other residuary personalty to themselves as trustees for sale. After arriving at this conclusion of fact, the Lord Chancellor, with

[1] [1913] A. C. 76, 82 L. J. Ch. 178.

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whom Lord Atkinson and Lord Shaw of Dunfermline simply concurred, laid down the law as follows:—

> "It follows that under these dispositions the residuary estate, including the chattels in question, became vested in the trustees as trustees. That they were the same persons as the executors does not affect the point, or in my opinion present the least obstacle to the inference. But if that was so, then the title to the silver plate of A. A. Solomon as executor had ceased to exist before he made the pledge of 1892. What then was the position of the appellants? . . . Upon no hypothesis did the appellants get a legal title to the property in the plate. When A. A. Solomon handed over these articles of silver to Messrs. Attenborough he had no property to pass as executor; and they got no contractual rights which could prevail against the trustees. The latter were the true owners and they are now in a position to maintain an action, which under the old forms would have been an action of trover or detinue, to recover possession of the chattels free from the restrictions on the rights to reclaim possession which were sought to be imposed by the contract between A. A. Solomon and the appellants. My Lords, the property, if I am right in the inference which I draw from the circumstances of the case, was vested not in A. A. Solomon, but in A. A. Solomon and his co-trustee jointly in 1892, when the attempted pledge was made; and I see no answer to the case made for the respondents that the present trustees, in whom that property is now vested, are entitled to recover it."

Mr. Williams submits that the decision of their lordships was wrong because they overlooked the following points of law; i.e., that the pledge of goods by one of two joint owners operates to sever the joint tenancy and to give to the pawnee a good title to one moiety of the goods as security for the loan; and that, where the maker of such a pledge is a trustee of the goods and the pawnee has no notice of the trust, the latter is entitled to hold his legal interest in the goods as security for the loan, as against all persons entitled in equity under the trust. He further submits that there is error in the suggestion made by the Lord Chancellor in his judgment that the interest of a pawnee of goods is in the nature of a mere contractual right, and not of a proprietary right; and contends that, though the bare right of property in goods

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pawned remains in the pawnor, the pawnee nevertheless obtains in them a legal interest, which is in the nature of a true proprietary interest, that is, of a *jus in rem*. Mr. Williams then cites his authorities for these two propositions and concludes as follows:—

> 'It does not appear that any of the propositions maintained in this article were submitted, or the authorities supporting them cited, to the judges who decided the case of *Attenborough* v. *Solomon*, either in the House of Lords or in the Courts below. And it seems that in the House of Lords the case was decided inadvertently, their lordships' attention not being called to the rules of law properly applicable. Of course, as to the case then before the Court their lordships' determination was final; and the appellants were left without remedy for the grievous injustice which, it is respectfully maintained they suffered" (*sc.* in their appeal being dismissed with costs). "But it is submitted, with great deference, that the decisions and the Lord Chancellor's judgment in the House of Lords cannot be treated as a valid authority either for the point decided or the law laid down therein.'

We have no space left in which to adequately notice a careful paper on 'Symbolical Deliveries by Documents' by Mr. Frank Tudsbery which is also contained in the *Law Quarterly Review* for January. In it the writer shews that the principles which govern the usage of documents of title in the transfer of goods which they represent are in some respects difficult to reconcile with the principles of English law, and suggests that the provisions of the law merchant when introduced into the common law of England have created an anomaly as regards the principles with which they may appear to conflict. Thus he says;—

> 'This especially is noticeable in the case of the holder of a bill of lading upon insolvency, and it is more consistent to explain the position in this way than by the attempt to substantiate a theory of symbolical delivery. For though he is *prima facie* the absolute owner of the goods, if he has acquired his title under a contract of sale, the unpaid vendor who has parted with the possession may by virtue of the equitable doctrine of stoppage *in transitu* retake them at any time before they have reached the possession of the purchaser. If the bill of lading is the symbol of

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> the goods, how can it be that the vendor having once parted with the possession of the goods, can ever regain them? The proposition is inconsistent with the fundamental principles of the English law of sale.'

The Journal of Comparative Legislation for January, besides a statement, in its usual careful manner, of the legislation for 1913 of British and Foreign countries, contains a long article on 'Trading with the Enemy' by Mr. G. G. Phillimore which may well be read in connection with the recent important decision of the Court of Appeal in England in *Porter* v. *Freundenberg*, and the other cases coupled with it, which we have noticed in our Current Commentary. There are also, as is customary with this publication a number of short Notes on various subjects of legal interest, and amongst them one speaking of the recent death of Sir William Anson, so well-known as the author of two great law books, the Principles of the English Law of Contracts, and the Law and Custom of the Constitution.

A. H. F. L.

The November issue of the South African Law Journal contains an Article on '*International Law and the Present War*,' by S. B. Kitchin. The writer distinguishes between that part of International law which is not international, but national, *e.g.*, Prize Court law, and that part which is not law, but morality, lacking any sanction strong enough to enforce it. Speaking of the German doctrine of Necessity, he quotes some prophetic words written by the late W. E. Hall in 1889: "Probably in the next great (European) war, the questions which have accumulated during the last half century and more will all be given their answers at once. Some hopes will crave for satisfaction; much envy and greed will be at work; but above all and at the bottom of all, there will be the *hard sense of necessity*. . . . Conduct in the next great war will certainly be hard; it is very doubtful if it will be scrupulous, whether on the part of belligerents or neutrals. . . . But there can be very little doubt that if the next war is unscrupulously waged, it will also be followed by a reaction towards increased stringency of law." The article goes on to touch upon the violation of Belgian neutrality, treachery and espionage in warfare, the laying of

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marine mines, and the position of South Africa. Mr. Kitchin combats the position taken by a few persons in his country that though the Empire is at war, the Union of South Africa has the option of remaining neutral, and is of the opinion that if German arms were successful, the Roman Dutch Law of South Africa would have to give way to the German Code.

One cannot read American legal periodicals without being struck with the fact that more thought is being turned on constitutional than almost any other questions. The cause of this is not far to seek. The constitution and the administration of justice appear in many places threadbare. The wheels do not work smoothly, and this unfortunate result has been caused by some very ill-advised tinkering in the past. The United States is suffering from an over-dose of Democracy, (for one can have too much of a good thing whether it be raspberry jam, whiskey and soda, or a theory of government), and the thoughtful members of the profession are pointing the return to saner and more efficient administration. Take, for example, an article by L. A. Emery, in the current number of the Yale Law Journal, entitled '*Government by Jury.*' Mr. Emery stoutly upholds the necessity for the right of trial by jury, but deplores the effect of measures passed in certain States to take from the judges the very necessary and useful function of summing up. In Illinois, the legislature has enacted that 'the judge shall only instruct as to the law of the case,' and even that must be in writing. In Georgia, if during the progress of any case, or in his charge to the jury, the judge shall 'express or intimate his opinion as to what has or has not been proved,' a new trial may be had. In Kansas, the judge must write out and number his instructions; and the Constitution of Oregon provides that the judge in charging the jury 'shall not present the facts of the case.' All this is lamentable. Juries are most necessary in our administration of justice, but they are not perfect. They are not made more perfect by withdrawing from them the assistance of the only competent and impartial person in Court. All government rests on confidence. It is only a question of whom you will trust. The essential thing is that men worthy of confidence should be chosen, and that they should be highly trained in their various duties, whether legislative, judicial or executive.

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In the same number of the Yale Law Journal is an article by E. P. Wheeler on *'The Supreme Court a Co-ordinate Branch of the United States Government.'* While we are not sure that we know what President Wilson means by calling the Courts the "balance wheel of our whole constitutional system" and by stating that "ours is the only constitutional system so balanced and controlled; other constitutional systems lack complete poise and certainty of operation, because they lack the support and interpretation of authoritative, indisputable Courts of law," we are interested in Mr. Wheeler's discussion of the different theories as to where lies the right to decide what powers are delegated to the United States and what are reserved to the States or to the People. There are four theories. The first that each State must decide for itself. Calhoun was the ablest and most brilliant advocate of this school. But that contention was untenable and would have rendered united government impossible, just as emphasis on the rights of Provinces would render impossible a Dominion, or exaltation of the rights of Dominions will destroy any hope of an Empire. The United States was nearly wrecked on this rock. The second theory was that each department of government should decide for itself. That sounds anarchistic. The theory so far as it is true is but an expression of the ultimate right of private judgment. But there must be regulation of this right, and that can only be, say the advocates of the third theory, by a Supreme Court, which must be the final arbiter of all these questions. There is a fourth theory which the author quite rightly attacks, for it is a theory detrimental to all good government. The dogma has received the vague title of Recall and Referendum. Put into plain English, what the Recall and Referendum mean, as applied to constitutional questions, is that the power of a temporary majority over the lives and property of the individual is absolute and uncontrolled. "When we remember that majorities in a popular government are fluctuating and that the same party that triumphs in one election is often defeated in the next, it will appear at once that to leave questions of individual right to the decision of a temporary majority would simply be to leave the right of the individual in a most vague and uncertain condition. The old maxim is that such a condition is a wretched slavery, *misera servitus.*" The despotism of an individual, says our author, is no more to be feared

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than the despotism of a temporary majority. While we do not subscribe to all the reasons advanced by Mr. Wheeler in his opposition to the Recall and Referendum, as applied to the judiciary and legal decisions, we agree in condemning it as inimical to progress and good government.

Mr. Samuel Rosenbaum, in the February issue of the *Illinois Law Review,* breaks a lance against the American system of electing judges by popular vote. In every State in the Union but thirteen the entire judiciary from the Supreme Court down to the justices of the peace, are elected at the polls. The candidates for the Bench usually occupy minor places far down on the ballot, and are swept into office by the success of their party ticket. As judges are prohibited by the Constitution from engaging in the practice of the law, the average judge finds himself at the end of four or six years, as his term draws to a close, cut off from active practice, facing the necessity of renomination and election, and conscious of the fact that his success depends, not alone upon the sterling quality of his conduct and decisions, but to an extent worthy of more than passing notice, on the good favour in which he is held in party councils. The result is that the work of the bench is hindered and a nation-wide distrust of the judiciary has grown up. Mr. Rosenbaum makes his point. The only ground on which we disagree is in the remedy suggested, i.e., that the judges themselves should fill vacancies on the Bench. It is argued that judges alone are both familiar with the men qualified for the position, and are sufficiently removed from the turmoil of party passions to assure a careful choice. Though Mr. Rosenbaum elaborates the point, he fails to convince us that the better method is not that pursued by British countries, nomination for life by the Executive.

We note two other Articles by Mr. Rosenbaum, who, by the way, is the Gowen Fellow of the University of Pennsylvania Law School, one in The Law Magazine and Review (Feb.), the other in the University of Pennsylvania Law Review (Feb.). Each deals with the English Rule Committee and its work, and the second entitled '*Studies in English Civil Procedure 2. The Rule-Making Authority*' (*continued*)

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we commend especially to our readers. It is a very interesting and very well-written sketch, partly descriptive, but largely historical, of the present Rules. In particular, the labours and revolutionary suggestions of the Committee of 1873 is well treated. It is, perhaps, not generally remembered that Lord Justice James and Mr. Justice Mathew advocated the abolition of pleadings. Lord Shand wished the Scottish procedure, in which the issues are framed, not by the contending pleaders, but by an officer of the Court. With his support and in furtherance of this idea, Mr. Justice Bowen invented the "omnibus summons." The unanimous recommendations of this Committee met with great criticism.

The Law Magazine and Review for February has a strong Article on *Trial by Court Martial.* Mr. H. H. L. Bellot writes in view of the recent Emergency legislation which has made this a very real question in England. By a stroke of the pen every British subject has become liable, not to Martial law as understood in times of emergency, but to Military law as administered by Courts-Martial. No wonder the Bill met with active opposition and criticism in the Lords, and was only passed when the Government consented that British subjects, who would under the Bill have no rights of appeal to the ordinary Courts and might be condemned to death and executed and those Courts be powerless to interfere, should have a trial before ordinary Courts when possible. At present, as Mr. Bellot points out, the Common law lies under the iron heel of militarism, and the ordinary Courts are subordinate to military tribunals. Mr. Herbert A. Smith has a paper on *'Sales "Without Reserve."'* and Mr. Charles M. Atkinson one on *'Corroboration in Bastardy Cases.'* Mr. W. E. Wilkinson discusses the changes made in the law of naturalization by the recent Act, and His Honour Judge Atherley-Jones, K.C., has an Article on *'Contraband of War.'* Mr. Frank Newbolt and Mr. Samuel Rosenbaum, as we noticed above, each contribute to an Article on *'The Rule Committee and its Work.'*

In the February number of the Harvard Law Review, George P. Costigan, Jr., finishes a careful paper on *'Constructive Trusts based on promises made to secure Bequests, Devises or Intestate Succession.'* The rules governing the different cases which arise are set out clearly: and the practice in different jurisdictions is indicated.

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In the same number there is, also, an Article (to be concluded) by Mr. Roscoe Pound on *'Interests of Personality,'* being Chapter IX. of a book entitled Sociological Jurisprudence now in preparation. The author finds seven interests of personality which the law should secure: (1) the right to physical integrity, (2) the right to free motion and locomotion, or as it is more often put, personal liberty, (3) the right to the use of natural *media,* air, light, etc., (4) the right of property, (5) the right of free exchange and free contract, (6) the right of free industry, (7) the right of free belief and opinion. In discussing the first of these rights, the inviolability of the physical person, which is the only one of these heads touched in this paper, Mr. Pound has some interesting observations on injuries to the nervous system; and considers the reasons which prompt the Court to give redress in some cases and not in others. Where there has been no physical impact and no independent right of action for a coincident injury, the Courts are loth to grant relief. In some cases the reason given is remoteness, in others a consideration of what is practicable. If, however, the nervous or mental shock is inflicted intentionally the Court allows recovery. There are also pertinent observations on the disputed legal right of privacy. The author takes the position that publicity with respect to private matters of purely personal concern is an injury. But as the injury is mental and subjective there are difficulties in the way of relief. The difficulties are discussed.

The Law Times for January 16, 1915, discusses *'The Executor's Right of Retainer,'* and for February 13th *"What is a Port?"* In the issue of January 2nd and 9th there is a collection of *'Decisions on War subjects.'* On January 23rd there is a discussion of *'Recent Decisions and The Law of Light;'* and on January 30th an Article on *'Alien enemies as Litigants.'*

The Solicitor's Journal and Weekly Reporter for January, up to and including the issue of February 13th, has articles on *'The New Naturalisation Act.' 'Licenses to use Patents Belonging to alien Enemies,'* by John Cutler, K.C.: *'German Legislation for the Occupied Territories of Belgium': 'Emergency Legislation of France': 'Estates by Estoppel.'*

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The Irish Law Times to February 6th contains papers on *'Negligence by Bankers'; 'Change in the Status of Married Women by the new Naturalization Act'; 'Important Decisions in 1914'*; and *'When a Licence is Revocable.'*

In the current number of the American Law Review Mr. George Whitelock has an article on *'Damages for Death by Negligence at Sea.—The Titanic.'* Though verdicts were rendered in England in June, 1913, in suits for damages against the Company, no litigants in the United States have yet reached that stage. Mr. Whitelock discusses among other matters the question of limitation of liability to the value of the salved property plus the freight pending. There is an article on *'Mercenary Matchmakers,'* and the invalidity of Marriage-Brokerage Contracts'; one on 'Seargent S. Prentiss'; and another on *'Christianity and Law.'*

The Columbia Law Review for February has continued papers by Walker Wheeler Cook and Jeremiah Smith on *'The Powers of Courts of Equity,'* and *'Private Action for Obstruction to Public Right of Passage'* respectively. The first deals with actions *in rem* in Courts of Equity, and considers to what extent it is true that "the law acts *in rem* while equity acts only *in personam*." The second is a careful consideration of the cases. The writer contends that the scope and effect of *Ricket* v. *Metropolitan Ry.*,[2] has been very much over-estimated, and that *Winterbottom* v. *Lord Derby*,[3] as to the principal point there decided is erroneous.

The February number of the University of Pennsylvania Law Review contains an Article by Roland R. Foulke on *'The Dedication of Streets in Pennsylvania.'*

The Michigan Law Review for February contains three good articles. *'Liability to Third Persons of Associates in Defectively Incorporated Associations,'* by Joseph L. Lewinsohn; *'The Early History of Equity.'* by W. S. Holdsworth, which is really a review of Mr. W. T. Barbour's book *'The History of Contract in Early English Equity.'* Oxford

[2] (1867) L. R. 2 H. L. 175.
[3] (1867) L. R. 2 Ex. 316.

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studies in Social and Legal History, Vol. IV., edited by Paul Vinogradoff, M.A.; and an Article on '*The Inefficiency of the American Jury*,' by Edson R. Sunderland. Mr. Sunderland finds the same fault with the American system as does Mr. Emery in his article in the Yale Law Journal, and condemns the rule now adopted in two-thirds of the American jurisdictions of prohibiting judges from advising juries on the facts.

The February number of *Case and Comment* (published by the Lawyers Co-operative Publishing Co., Rochester, N.Y.), has an Article on the '*Liability of a Proprietor of a Place of Public Amusement for Injury to a Patron*,' by John D. Chamberlain of the Rochester (N.Y.) Bar. In a collection of American cases the author treats of such topics as Races, Firearms, Collapse of Seats, Falling objects, Bathing Resort and Merry-go-Round. The same periodical has articles on the '*Growth of anti-Liquor Legislation*'; and '*Constitutional Limitations as Applied to the Initiative and Referendum*.' The American Law Review, vol. 49, No. 1, discusses at p. 156, Mr. Hedges' book on the working of the Initiative and Referendum, in Oregon, and the effects, good and bad, of that constitutional experiment.

L. D.

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ORTENBERG v. PLAMONDON.

Defamation—Lecture assailing Jews of Quebec—Restricted collectivity—Right of action by individual Jew not personally attacked.

Where in a lecture delivered in the City of Quebec the defendant violently assailed and abused the Jewish race, its religious doctrines, and social practices, the object being to put the public of Quebec on guard against the Jews of Quebec, who numbered only 75 families in a total population of 80,000 souls.

Held, that, though not assailed individually, the plaintiff being one of the "restricted collectivity" of the Jews of Quebec, was entitled to bring an action of defamation against the lecturer, the Jews of Quebec being sufficiently designated as the object of the lecturer's attack.

Quebec Court of Appeal. ARCHAMBEAULT, C.J., TRENHOLME, CARROLL, CROSS, J.J., and ROY, J. AD HOC.

DECEMBER 29TH, 1914.

Appeal by plaintiff from the judgment of the Superior Court, Quebec, October 22nd, 1913, reported 14 D. L. R. 549.

S. W. Jacobs, K.C., L. A. Cannon, K.C., and Louis Fitch, for Appellants;

J. E. Bédard, K.C., E. Belleau, K.C., and J. A. Lane, K.C., for Respondents.

CARROLL, J. (Translation).

The appellant, Ortenberg, a merchant of St. Rochs, belonging to the Jewish race and religion, complains that the respondent Plamondon, in a lecture delivered by him, attacked the Jew in general and the Jews of Quebec and the plaintiff in particular. Leduc, the other respondent, printed the lecture.

Ortenberg says that the lecture in question attacks him in his honour and his well-being; as a result of this lecture he was insulted and assailed, and has lost a portion of his trade, and he asks for $500 damages.

The respondent pleads that he did not attack the plaintiff personally, but the Jewish race, and its methods, and that he had in mind the "Jew" collectively; that the accusations are true and in the public interest, and had for object to put the Christian population of the Province of

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Quebec on its guard against the Jewish invasion. In addition, he says that the lecture contains, in substance, but the accusations made against Jews in the old and new testaments, in numerous works published on the Jewish peril during the past fifty years at least, and in the press; that the facts related are of public notoriety, legitimate matter for polemical discussion, like all other social, political or religious questions.

The plaintiff inscribed in law against certain paragraphs of the plea. This inscription was reserved for the trial judge, and, in the present state of the record, it is, perhaps, useless to decide if this inscription was well or ill-founded.

The judgment dismissed the action for the reason contained in the following considérant:—

"Considering that, according to law, if the writing complained of contains no defamatory allegation or imputation against any person, but confines itself solely to a discussion more or less violent and impassioned, of philosophic, social or religious opinions against a corporation, a religious sect, or an association, there is no defamation."

The principle is well-established and there is no doubt that had the Court of first instance believed that the plaintiff was sufficiently designated, the respondents would have been condemned.

The object of the speaker is seen at the commencement of the lecture:

> "Although from the pulpit our revered pastor told us long ago that the Jew is not only a stranger but an enemy in our midst, yet few people believe that this fellow with the timorous and cringing look constitutes a real danger."

Plamondon tells us that his lecture is an attack against the Jews of the entire world, comprising those resident in Quebec; that he excepts none; that the accusations comprise all the Jews, with no intention, however, of attacking any one in particular; that is the gist of his deposition.

The lecture itself may be resumed in these words:—

It is stated that the Talmud teaches Jews

> "that our Lord Jesus Christ is an idol, begotten in vice, and in adultery; that his followers are therefore idolators; that the goyim (the non-Jew, and particularly the Christian) is an animal; that he who

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returns to a non-Jew a lost article commits a sin because he adds to the power of the impious; that our learned Rabbis, (it is a Rabbi who speaks) were right in teaching that an Israelite is permitted to practise usury towards the Christian (Goy); that if a Christian needs money, a Jew may wilfully deceive him; he may compound usurious interest until the amount is so high that the Christian is unable to pay without selling his goods; that it is permitted to abuse the wife of the unfaithful, that is, a non-Jewess; that he who causes the blood of the impious to flow, that is to say, of non-Jews, offers a sacrifice to God; that the best among Christians should be strangled; that a Jew who has the power ought, under any pretext whatever, to publicly put heretics to death; that a Jew accused of murdering a man (a Christian) may swear that he has not killed a man, making the mental reservation that it is merely an "animal that he has killed."

The lecturer continued:

"Are not these precepts of the Talmud, taught, explained and commanded to the Jew by his spiritual advisers, the Rabbis in the synagogues, edifying? For us poor Goyim, rape, adultery, theft, usury, murder and false swearing are abominable crimes which our religion rejects and prohibits. If we commit them we are afflicted with remorse and sadness. To a Jew these heinous crimes are considered such virtuous acts that his religion teaches and commands him to practice them, and he retains in his mind as pleasant a memory of them as if he had performed a good deed. You ought to begin to see that the Jew is a man in a class by himself, *and that his presence in our midst is not desirable.*"

The lecturer then went on to cite certain traits and characteristics attributed to the Jewish race, and accused the race of being guilty of ritual murder, and he continued:

"The few facts which I have related to you are taken, it is true, from countries other than ours. But the Jew, bear in mind, is the same in all places, and that which he has done elsewhere he will certainly do here, the day he believes himself sufficiently strong to attempt it. Has he not already shown among us his tendency towards oppression, and his irresistible desire to attack our religion?"

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After quoting an article from the "Progrès du Saguenay," on "Sunday Labour and the Jews," the lecturer made the following comment:

> "Even in St. Roch's, Sunday labour, which this writer denounced so rightly and with such eloquence, is performed by the Jews. There is a factory at 115 1-2 or 117 St. Joseph Street where parties, worthy of belief, have told me with righteous indignation, regular labour is performed every Sunday in the year."
>
> "This is the first encroachment of the Jew among us; are we going to be so blind, so weak, as to submit without protesting?"
>
> "Will you continue, ladies, to purchase from these Jews garments made on Sunday in contempt of our holy religion, which they now silently treat with scorn, awaiting the time when they can show their hand publicly without danger.
>
> "Will you continue, gentlemen, to rent, or what is still worse, to sell your houses to these people, thus permitting them to obtain a foothold among you, and assist them to realize their fond dream of enslaving us?"

I do not intend to enter into a discussion of the theories and opinions of l'Abbé Lamarque, and other authors upon whom the lecturer relies. Suffice it to say, that for the purposes of the present case, it has not been proven that the Talmud teaches that murder, adultery, theft and other crimes, if practised against Christians, become for Jews virtuous acts. Abbés d'Amour, Grandbois, and Nadeau, who were heard, state clearly that they base their opinions upon reliable authors, but not one of them has read the text of Talmud, nor can he read it because he has not sufficient knowledge of the language in which the work is written.

The accusation, to my mind, resolves itself to this: The Jew is obliged to obey the teachings of the Talmud; the Talmud teaches that these crimes are not crimes towards Christians. The Jew is the same everywhere, and after having mentioned all the abominations attributed to the Jewish race, the lecturer said: "Do you begin to understand that the Jew is a being living by himself and that his presence in our midst is undesirable,—that which the Jew has done elsewhere, he will do here as soon as he is able."

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After stating that the lecture was not a personal attack, the respondent declares that what he said applies to Quebec; that he makes no exception to any Jew in Quebec, of all the accusations charged against the Jewish race.

Among those who heard the lecturer were certain urchins who, a few days afterwards, threw a stone, smashing a window of the house belonging to the appellant, who was also insulted on the street, and, in addition, his business suffered.

Without doubt, attacks against a race, no matter how violent they may be, cannot give rise to an action in damages; writers may state everything they think against a collectivity of people, with this restriction, however, that if any one of the individuals of such collectivity is aimed at specially by the defamation, and suffers damage, he is entitled to an action at law. If the collectivity is numerous there is no right of action, because the injury in that case is not deemed to indicate any one person. Whether the collectivity is or is not sufficiently numerous to give the right to an action is a question of fact left to the discretion and wisdom of the Courts.

The object of this lecture was certainly to put the public on guard against the Jews of Quebec, numbering 75 families, in a total population of 80,000 souls.

By imputing to this restricted collectivity all the crimes of the Jewish race, they are sufficiently indicated, and I adopt as well-founded the following judgment of the Tribunal Civil de la Seine, *Corinaldi and others* v. *Feuillebois Renaud*:—

> "When a defamatory or injurious imputation indicates a number of persons sufficiently considerable not to cause to any of them personal wrong, individual action belongs to none of these persons, the defamatory matter being in such case so general and vague that it is in a way indiscernable: but it is otherwise when the number in the collectivity is sufficiently restricted that the defamation or injury, without indicating them particularly, attacks them personally: in that case, each one of them must be given the right to exercise for himself, on his own account, an action for defamation."

There is a great difference between the present case and the case decided by the Cour de Cessation, of *l'Abbé Caset*

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C. Iribe v. *Rigaud,* reported in Dalloz, Périodique, de 1894-1-25. In that case, Freemasonry was attacked. No precise fact was charged against the five or six Freemasons established at Tannarive where the Abbé Cazet published his pamphlet. The incriminating matter discussed in the pamphlet, says the arrêtiste, was Freemasonry considered *in the abstract;* no name was mentioned; *no allusion was made to any act* which could be imputed to any particular individual as a result of the publication of the pamphlet. The attention of the inhabitants of the district might have been directed to such or such a person known as forming part of the Masonic order by public notoriety, but it was not sufficient to change a general discussion into a personal attack in which one of the essential elements of an offence is lacking.

In the case at present under review, it is said:—

> "The Jews in other countries have been guilty of murder, rape, adultery and theft against Christians; the Jew is the same everywhere; what he has done elsewhere, he will do here when he becomes sufficiently strong to attempt it."

The Jewish collectivity of Quebec is composed of 75 families, as I have already stated, in a population of 80,000 souls. This is not the case of a wrong against an entire class so large that the injury is lost in its numbers.

In the case of the *Assumptionists* v. *Ternate,* reported in the Recueil Périodique de Dalloz, 1902, 2nd part, p. 55, we read that Ternate published in the journal, "La Lanterne" several defamatory articles. The defence was that no individual member of the order was indicated, but the association itself was meant as a corporate body, without reference to its members, who did not possess the necessary legal quality to complain individually. The articles said, among other things, that the Assumptionists "excelled in matters where swindling disputed with hypocrisy," and the epithets of crooks, clerical-garb wearers, adventurers, rascals, blackmailers and filibusterers were used. The Court decided that these injuries could not be considered as not attacking any one person: that they were merely insults against individuals and not a discussion of the society, its organization, its work and its tendencies, and after having cited other injurious statements directed against them, the Court continued:—

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> "It is impossible to see in these imputations attacks directed exclusively against the society: they relate to precise acts alleged to have been committed by the Assumptionists, now living; that indicating, without distinction, all the Assumptionists who formed a limited collectivity, the said insults and defamations attacked each of them."

In a note at the end of p. 53, the arrêtiste expresses himself thus:—

> "When a defamatory allegation is directed against a group of people, three situations are possible. The members of the group may be attacked without exception, or certain members designated or easily recognized are alone indicated, or, finally, the defamatory matter is only attributable to certain members of the group, which members it is impossible to indicate. Those in the two first classes present no serious difficulty; the right to sue individually is given to every one defamed; however, their number may be so large that no one could be really affected. On the contrary, if the number of people indicated is restricted suspicion attaches to all, and the action lies for each of them. Thus may be mentioned as contrary to the present state of the law a judgment which refused to one of the members of a Republican majority of the House of 1876, who took part in the vote given by 363, the right to complain individually of the defamatory allegations directed against that majority."

In a word, the question at issue may be resumed as follows: Is the attack directed by the respondent against the Jew a general attack against the Jewish race, its methods, its doctrines, its activities,—an impersonal attack, or, are the persons forming the Jewish community of Quebec sufficiently designated in this lecture? I am of opinion that they are sufficiently designated, that the plaintiff was included in this slander, that he has been injured in his sentiments and in his well-being, and that he ought to obtain judgment.

In England, in the case of *Lefame* v. *Malcolmson*, 1 H. L. C. 663, the Lord Chancellor said:—

> "If a party can publish a libel so framed as to describe individuals, though not naming them, and

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> not specifically describing them by any express form of words, but still so describing them that it is known who they are, as the jurors have found them to be here, and if those who must be acquainted with the circumstances connected with the party described may also come to the same conclusion, and may have no doubt that the writer of the libel intended to mean those individuals, it would be opening a very wide door to defamation, if parties suffering all the inconvenience of being libelled were not permitted to have that protection which the law affords. If they are so described that they are known to all their neighbours as being the parties alluded to, and if they are able to prove to the satisfaction of the jury that the party writing the libel did intend to allude to them, it would be unfortunate to find the law in a state which would prevent the party being protected against such libels."

At page 667, Lord Campbell said:—

> "Whether a man is called by one name, or whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, *if those who look on, know well who is aimed at,* the very same injury is inflicted, the very same thing is in fact done, as would be done if his name and Christian name were ten times repeated."

Let it be clearly understood: the respondent is not condemned because he attacked the Jewish race or religion, nor for having repeated the accusations which historians and pamphleteers have made against Jews in general, nor because he denounced with reason Sunday labour; but he is condemned for having attributed to all and each of the 75 Jewish families of Quebec the wish to commit the abominable crimes of which their race is accused, when they have obtained sufficient strength to so commit these offences.

In that, there is personal defamation.

The respondent says in his factum:—

> "Naturally nothing should be done to awaken hatred, and for the Christian it is a duty not to molest Jews. Besides, they have nothing to complain of, seeing that they have equal rights here, which the Province of Quebec conferred on them in

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1832, at the time of the election of Mr. Hart in Three Rivers, rights granted them before they were obtained in England."

Assuredly, no other country better understands or permits the freer enjoyment of liberty than this Province, and if civil liberty conferred upon Jews has been a benefit to them, does not the respondent fear that he will make them lose sight of this great blessing by covering them with opprobrium, for, according to the high sentiment of Sainte-Beuve: "S'il y a des bienfaits qui obligent, il y a des injures qui alièment à jamais et qui délient."

I am of opinion that the respondent was in good faith. He felt he was performing a public duty, but he has injured the plaintiff. The costs are heavy. He will be condemned to $50, but he must pay all the costs. Leduc is condemned to pay $25 with costs.

Judgment of the Superior Court reversed, with costs.

ARCHAMBEAULT, C.J., TRENHOLME, CARROLL, and ROY, JJ., concurred.

CROSS, J.:—This is an action taken by the appellant to recover damages for defamation alleged to have been done by the respondent in a public lecture delivered to the people of St. Roch's, in the City of Quebec.

It is set out in the action that the appellant plaintiff is of the Jewish faith, that the respondent's statements at the lecture were to the effect that the teachings of the Jewish Talmud is wicked in certain specified respects, such as that Christ-worship is idolatry, that usury and trade oppression against Christians is commendable, that the choking of persons not of the faithful and the shedding of the blood of Christians is permissible.

It is alleged that the assertion that the Talmud contains such teachings is false and malicious and was made to render the plaintiff and others of his faith odious, and that appeal was made to the persons at the meeting to have no dealings with the Jews; that these statements are of a nature to hurt the appellant's business; that in consequence of them the appellant has been violently attacked by people in Quebec, and that the appellant is entitled to recover damages.

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The defence pleaded is to the effect that the lecture speaks for itself; that the defendant does not know the plaintiff at all; that the Talmud does contain the teachings mentioned; that what was said at the lecture is true· that nothing was said about the plaintiff individually; that there is and has always been irreconcilable antagonism between Christians and Jews; that Christians regard Jews as a social pest; that the lecture merely repeated in good faith and in the public interest "les accusations consignées contre les Juifs dans les deux Testaments, dans les innombrables ouvrages publiés sur le péril juif depuis au moins cinquante ans et dans la presse," and it is alleged, respecting the lecture, that "elle n'incrimine que la race juive, ses doctrines et ses pratiques religieuses et sociales et les signale comme dangereuses pour le peuple chrétien de cette province."

It has been found by the Superior Court, as a matter of fact, that the defendant in his lecture only called in question the Jewish race, its religious doctrines and social practices, and did not attack the plaintiff.

If that finding of fact be accurate, it may well be that the judgment dismissing the action was a right conclusion in law.

It will be seen, so far as grounds of action are concerned, that the appellant did not set out in his declaration special damage in the way of exposure to loss of business and of actual personal ill-treatment.

It is proved that the anti-Jewish sentiment which followed upon the delivery of the lecture was such that persons who had dealt with the appellant shunned him, that his business fell off noticeably, and that he was insulted by youths in the street as "le Juif," and the shutter of his dwelling was broken by a stone thrown by the youths.

Those effects will be found to have been what might have been expected when it is considered that there are only about seventy-five Jewish householders in Quebec, that the appellant is a dealer in clothing at St. Roch's in Quebec, near where the lecture was delivered; that he, in fact, lived across the street from the respondent's own dwelling-house, so that a crowd of youths might applaud in front of the respondent's house and jeer in front of the appellant's house without changing place.

I do not grasp what the respondent means by saying in his plea that he did not know the appellant at all.

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Respecting what the respondent said at the lecture, it can be said that what is charged in the plaintiff's declaration to have been said, was in fact uttered.

The lecture consists largely of quotations from books or pamphlets of more or less known writers, wherein the Jew is described in terms such as to make him an object of detestation from almost every possible point of view. After having made a number of such quotations, the respondent summarised thus: "Voleur de nos biens, corrupteur de nos femmes, assassin d'enfants chrétiens, le Juif est aussi fauteur de révolution ou il trouve ample carrière à exercer ses perfidies habituelles."

So far, it may be that the lecture might be considered as a mere pronouncement upon "la question juive," that is, an opinion upon a general question of a racial, or religious, or social kind, upon which there could be no ground for recovery for personal defamation.

It is, however, to be observed that, towards the end of his lecture, the respondent made reference to the matter of non-observance of the Sabbath. He said that there was a garment making shop at No. 151½ or 117 St. Joseph Street, wherein Sunday work was habitually carried on, and added in conclusion: "C'est un premier empiètement du Juif sur nous; allons-nous être assez veules, assez mous pour le subir sans protester?

"Continuerez-vous, Mesdames, à acheter de ces Juifs des vêtements qu'ils out confectionnés le dimanche, an mépris de notre sainte religion dont ils se moquent déjà sans bruit en attendant qu'ils la puissent outrager ouvertement sans danger?

"Continuerez-vous, Messieurs, à louer, ou, ce qui est un mal encore plus grand, à leur vendre vos maisons pour elur permettre ainsi de prendre pied chez nous et les aider par là à réaliser le rève qu'ils caressent de nous asservir?

"La patrie inquiéte attend vetre réponse."

I have already indicated what effect that sort of thing might have been expected to have, and what effect it, in fact, did have upon the appellant. He was subjected to affront in public and his business was damaged.

I cannot agree that the respondent's utterances amount merely to a non-actionable denunciation of controversion of a race, or religion at large. They were that and, as regards the appellant, they were more. They were an invitation and

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incitement to a boycott of the handful of Jewish traders in the City of Quebec. The invitation to boycott was accepted and acted upon.

The respondent is answerable in reparation of the wrong which he thus caused to the appellant.

In *E. Hulton & Co.* v. *Jones,* [1910] A. C. 20, 26 T. L. R. 128, it was held that "if in the opinion of the jury the language used is defamatory, and a substantial number of persons who know the plaintiff would read the alleged libel as referring to him, damages are recoverable, even although the writer or publisher may neither have known of the plaintiff's existence, nor have intended to refer to him or any other particular individual."

That view was given effect to in this Court in *La Presse & Giguère,* Que. 17 K. B. 268.

Those are cases of libel. I, however, consider that it would be a mistake to test the appellant's right of recovery in this action by rules applicable only to actions of defamation or libel. The declaration in this case discloses a wider cause of action, namely that of an action in damages for words maliciously spoken, such a cause of action as I find described in a modern treatise as follows:

"It is a general rule an action will lie against any one who has without just cause or excuse published words which are untrue, if their publication has caused the plaintiff pecuniary loss. This is so, although the words are not defamatory, i.e., although they do not injure the reputation of the plaintiff, either personally or in the way of his profession or trade, so that no action of libel or slander will lie. . . . The action will not be one of defamation; it is an action on the case for maliciously acting in such a way as to inflict loss on the plaintiff." Ency. of Laws of England —Wood-Reuton, Tit. "Words causing damage," 2nd ed., p. 828,—citing *Royal Baking Powder Co.* v. *Wright Crosley & Co.* (1900), 18 Rep. Pat. Cas. at p. 90 and p. 104.

The respondent pleaded that the statements made in his lecture are true, but he has failed to prove the ground of defence. He is in the position of having maliciously caused damage to the appellant. It is merely a case of applying art. 1053 C. C.

I would maintain the appeal and give judgment for damages in the appellant's favour.

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NEW BOOKS AND NEW EDITIONS.

The Judicature Act of Ontario (being R. S. O., 1914, Chapter 56) and The Consolidated Rules of Practice and Procedure of the Supreme Court of Ontario of 1913 with practical notes (founded on Holmested and Langton's former editions of the Judicature Acts and Rules). By George Smith Holmested, one of His Majesty's Counsel for Ontario, and Senior Registrar of the High Court Division of the Supreme Court of Ontario. Fourth Edition, 1915. Toronto: The Carswell Company, Limited, 1915; London: Sweet & Maxwell, Limited.

This work, which no longer, alas! can be known as "Holmested and Langton," may be called in every sense of the word, excepting permanency, a monumental work. Rules of practice are frequently changing, and decisions crowd upon decisions; and the Profession will be fortunate indeed if it always has to hand a guide of the complete and exhaustive character which Mr. Holmested now gives us in this, the latest edition of a Work known to every Ontario practitioner and student-at-law. Including *Indices*, the book has now reached 1,863 pages.

Outlines of Constitutional and Administrative Law. By Dalzell Chalmers (Law and Modern History Tripos, Cambridge), Barrister-at-Law, Author of "The Law as it affects Cyclists" and Joint Author of "The Student's Guide to Roman Law," 1910. London: Stevens and Haynes, Law Publishers.

We have carefully studied this little book throughout and can cordially recommend it to students of Constitutional law at colleges and universities. The counsel of perfection for such students is to read every line of Dicey's Law of the Constitution, and Anson's Law and Custom of the Constitution. Those who cannot rise to these heights will not, we think, secure a better synopsis of the contents of those and other extensive works than this little book.

Mens Rea or Imputability under the Law of England. By Douglas Aikenhead Stroud, LL.D., Professional Assistant in the Solicitor's Department, General Post Office, London. (Thesis approved for the Degree of Doctor of Laws in the University of London) 1914. London: Sweet & Maxwell, Ltd., 3 Chancery Lane, W.C. Toronto: The Carswell Co. Ltd.

This Work has been written with the double object of presenting a comprehensive view of the main principles of imputability of criminal guilt, and of furnishing a practical

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guide to the statutes and case laws in which these principles have been applied. The author has chosen one of the most interesting subjects open to treatment by legal text writers. He appears to have gone into his subject very thoroughly. He discusses, as bearing upon the question of imputability, ignorance of fact, ignorance of law, infancy, insanity, drunkenness, negligence, compulsion, and matters incidental thereto. The book is one which will be useful to criminal practitioners and interesting to psychologists.

The Law of Contract During War with leading cases, statutes, and orders-in-council. By William Finlayson Trotter, M.A., LL.M., (Cantab), of Lincoln's Inn, Barrister-at-Law, and advocate, Professor of Law in the University of Sheffield, examiner in law in the University of Leeds. London and Edinburgh: William Hodge & Company, 1914.

The legal profession is beginning to produce its own War books. This is the first which has come under our immediate notice. It is an attempt—more or less imperfect from the nature of the task—to discuss the legal effect of war upon contract, with special reference to present circumstances. The first part, containing 76 pages, comprises a general statement of the law. The 2nd part consists of full reports of some eighty-five leading English and American decisions; while the 3rd part comprises statutes and Rules of Court. The book even contains a note of the decision of the Court of Appeal in *Porter* v. *Freunderberg,* noted among recent English decisions in our present issue.

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LOCAL AND PERSONAL.

By the decision of Mr. Justice St. Pierre Mrs. Annie Langstaff has been refused permission to take examinations for admission to the Quebec Bar. The decision will probably be appealed. It is said that the Montreal Council of Women is arranging for a mass meeting of protest.

The twenty-ninth annual meeting of The County of York Law Association was held at the City Hall, Toronto, on the twenty-fifth day of January, 1915. After the annual report of the Trustees of the Association had been read and adopted, Mr. A. MacMurchy, K.C., presented the report of the Special Committee on the new Registry Office, Mr. George C. Campbell read the report of the Special Committee on Consolidation of Registry Systems, and Mr. R. J. Maclennan read the report of the Committee on Legislation. These reports were discussed and adopted. The Association testified their appreciation of the interest in her work and the efficiency shown by Miss Read, the Librarian, during the past year. The Librarian's report showed that the Library now contains 6338 volumes, of which 168 were added during the year 1914. A resolution was passed deprecating the practice of handing out information concerning wills by Surrogate Court Clerks to non-interested parties. The Special Committees on the New Registry Office, on Consolidation of Registry Systems, and on Legislation, appointed last year, were continued.

The election of Officers for the year 1915 resulted as follows:—President, M. H. Ludwig, K.C.; Vice-President, Angus MacMurchy, K.C.; Treasurer, George C. Campbell; Secretary, W. J. McCallum; Curator, J. D. Falconbridge; Historian, Beverley Jones; Auditors, R. D. Hume and T. H. Barton; Trustees, D. T. Symons, K.C., Shirley Denison, K.C., H. W. Mickle, G. L. Smith, E. J. Hearn, K.C., J. E. Day, D. Urquhart, Edward Bayly, K.C., and R. J. Maclennan.

Hon. Rodolphe Lemieux, former Postmaster-General in Sir Wilfrid Laurier's Cabinet, was on the afternoon of February 9th called to the Ontario Bar. He was introduced by George F. Shepley, K.C., treasurer of the Ontario Law Society. Hon. Mr. Lemieux was accompanied by Sir Allen

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Aylesworth, N. W. Rowell, K.C., and other prominent members of the Bar. He was welcomed by Mr. Justice Sutherland as one of the leading jurists of the Quebec Bar.

J. A. H. Cameron, Esq., of Montreal, formerly of Mabou, C.B., has been created a King's Counsel.

At the annual meeting of the Kingston and Frontenac Bar Association the following officers were unanimously re-elected. President—J. L. Whiting, K.C., Vice-President—J. B. Walkem, K.C., Sec.-Treas.—T. M. Asselstine. It was decided that law offices should close the year round on Saturday afternoons. The annual meeting was made the occasion for a presentation to Mr. J. H. Whiting, K.C. of a loving cup, on behalf of the members of the Association.

H. A. Fortier, Esq., K.C., M.PP., and Fernand B. Major, Esq., have gone into partnership in Hull, Que.

We regret to announce the death of John W. Lunney, a graduate of the University of Toronto, who had recently headed the graduating year in Law in the Province of Manitoba. His fine qualities would have been an ornament to the profession.

J. A. Campbell, Esq., formerly of Douphin has opened an office at Le Pas.

John A. Ardagh, Esq., late Senior Judge of Simcoe County, Ontario, who passed away recently in his 80th year, was born at Waterford, Ireland. He was educated at Barrie High School and Trinity University, and was called to the bar in 1861. He was interested in many forms of social service, and was chairman of the High School Board, had contributed valuable papers to the local Historical Society, and had been Vice-President of the Ontario Pioneer and Historical Society.

Chief Justice Sir Charles Peers Davidson, who retired from the Bench on Saturday, was born at Huntingdon, Que., and educated at Huntingdon Academy and McGill University. He was called to the Bar in 1864 and created a K.C. in 1876. He has taken a very prominent part not only in legal matters but in the Militia. He entered the Victoria Rifles as a private in 1862 and passed through the various grades until he became commander of the regiment. Sir

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Charles served with the regiment through the Fenian Raid. He retires from active life with the best wishes of the profession throughout the Dominion.

William Barrett, Esq., Senior Judge of Bruce County, Ontario, has died in his 73rd year.

Crown Attorney Smiley, of the former firm of Hartman and Smiley has closed his offices in New Liskeard and will in future practice at Haileybury.

N. F. Hagel, K.C., of Winnipeg, formerly one of Manitoba's leading barristers is dead. Mr. Hagel was born in the County of Oxford, Ont., in 1846 and was educated in the Grammar schools of Ingersoll and Woodstock. He served as a volunteer during the Fenian Raid in 1866, and received the well known medal with the red and white ribbon and one clasp. For a period of over twenty years, before he went to the Yukon, he was leading counsel in most of the important civil and criminal cases on the calendars of the Manitoba Courts.

E. G. Halloch, Esq., for forty years County Crown Attorney has died at Perth.

The Hon. James Gervase Conroy, Judge of the Central District Court, St. John's, Newfoundland, is dead.

H. C. G. Mariotti, B.A., B.C.L, formerly of the firm of Surveyor, Ogden and Mariotti, Montreal, is now practicing alone. Mr. Mariotti, has recently returned from Paris where he was following a post-graduate course as winner of the Macdonald Travelling Scholarship from McGill University.

At a regular meeting of the Council of the Nova Scotia Barristers' Society, the following examiners from amongst the Bar Society were appointed to act with the Law Society of Dalhousie University in examining the papers for the degree of LL.B.: Real Property and Wills—Alfred Whitman, K.C., B.A., LL.B. Equity—Alfred E. Silver, K.C., B.A., LL.B. Contracts—W. C. McDonald, M.A., (Harv.) LL.B. Crimes and Torts—W. J. O'Hearn, K.C., LL.B. Bills and Notes and Sales—C. J. Burchell, K.C., M.A., LL.B. Constitutional Law and History—J. J. Power, K.C.,

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M.A., LL.M., D. C. L. Insurance—W. H. Fulton, K.C., B.A. Evidence—W. H. Covert, K.C., LL.B. Domestic Relations—J. A. Chisholm, K.C., M.A., LL.B. Corporations and Partnership—E. P. Allison, K.C., B.A., LL.B. Procedure and Practice—T. W. Murphy, K.C., LL.B. These examiners will act at the sessional examinations to be held in April next for the first time. A motion was passed asking the judges to amend the rules with regard to security for costs by having defendants swear to merits in accordance with the English practice.

The Benchers of the Law Society of Upper Canada have passed a resolution providing that all Students-at-Law who have joined the forces at the front shall be granted their year.

Mr. George Herbert Head, who has been a member of the firm of Tupper, Kitto & Wightman for the past 18 months, has made a new arrangement with this firm whereby he becomes junior counsel for the firm as from February 1st. He will also, under the new arrangement, take his own private work and cases. Mr. Head has been practising in Vancouver for two and a half years.

His Honour Judge Herbert Stone McDonald, M.A., D.C.L., Senior Judge of the United Counties of Leeds and Grenville, has retired after 42 years on the bench. Born in 1842 at Gananoque he is a son of the late Honourable John McDonald, one time Legislative Councillor for Upper Canada. He was educated at the Gananoque Grammar School and at Queen's College, Kingston, graduating in Arts from that institution in 1859. He was called to the bar in 1863, and in 1873 appointed to the bench. During the Fenian raids of 1866 and 1870 he served in the Brockville Militia for which he has a medal with two clasps.

The New Brunswick Barristers Society, at its annual meeting elected the following officers: President, A. R. Slipp, K.C.; vice-president, W. A. Ewing, K.C.; secretary-treasurer and librarian, Dr. T. C. Allen; council, J. D. Phinney, K.C., M. G. Tweed, K.C., A. J. Gregory, K.C., F. R. Taylor, K.C., M. N. Cockburn, K.C., P. J. Hughes, A. B. Connell, K.C. A communication was received from a select committee of the Senate of Canada, appointed to consider the advisability of limiting the right of appeal to the

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Supreme Court of Canada and to the Judicial Committee of the Privy Council to certain classes of cases. A discussion ensued, the general opinion being against any limitation. The matter was referred to the council. The faculty of the law school of Dalhousie University presented a proposition for a conference with a committee of the Barristers Society in regard to the status of New Brunswick students at Dalhousie in regard to admission to the New Brunswick bar. After discussion it was decided to appoint a committee of the council to meet a committee of Dalhousie law faculty to report at the next meeting of the society. Matters of the relations of the St. John Law School to the Barristers Society were referred to the council.

Patrick K. Halpin, Esq., has been appointed town solicitor for Prescott, Ont.

Sir Francois Xavier Lemieux, acting Chief Justice of the Superior Court in the Quebec district has succeeded Sir Charles Peers Davidson as Chief Justice of the Superior Court of that Province. The Honourable Mr. Justice Archibald, Senior English-speaking Judge of the Provincial Superior Court, has been sworn in as acting Chief Justice of the Superior Court. J. S. Maclennan, Esq., K.C., has been elevated to the position of a Judge of the Superior Court.

J. E. Caldwell, Esq., of Moose Jaw, Sask., announces that he has taken into partnership Walter Mills, K.C., of the Ontario Bar. Mr. Mills, who is a practitioner of twenty-four years standing in Ontario, is well known to the members of the profession here, having for several years acted as Crown Counsel in various Courts on retainer from the Attorney-General for Ontario.

John Kelley Dowsley, K.C., of Prescott, Ont., who has been appointed Senior Judge of the Counties of Leeds and Grenville, was born at Prescott in 1857. He was educated at the public and high schools of his native place and Osgoode Hall, Toronto. In 1882, he was called to the bar. For six years he practised law in partnership with F. J. French, K.C., ex-M.PP., and for a number of years he has been town solicitor for Prescott, and is a recognized authority on municipal law and affairs.

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The Canadian Law Times.

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BY THE WAY.

Members of the legal profession and others have been kind enough to comply with our request to furnish names inadvertently omitted from the list included in our last issue of Ontario lawyers and law students on active service for the Empire. We, therefore, now wish to add the following:—

Lieutenant-Colonel F. Holmes Hopkins, Lindsay.
" " C. H. Maclaren, (now serving as Major in command of the Second Battery, First Brigade, C. F. A.), Ottawa.
Captain F. H. Greenlees, London.
" G. N. Weekes, London.
Second Lieutenant Reginald J. Orde, (Royal Field Artillery), Ottawa.
Lieutenant J. P. Cartwright, (Machine Gun Section, First Contingent), Toronto.
Private Henry Kelleher, Toronto.

If others who notice omissions will be equally kind and call our attention to them, we may ultimately be able to furnish a complete list, which we venture to say, should find its ultimate resting place on the walls of Osgoode Hall. By the way, no more suitable words could be placed at the head of such a list than the noble motto of our province—'*Ut incepit, sic permanet, fidelis.*' It would be well if it was inscribed over the entrance of every public school in the province, so that the children might ask what it means, and have it explained to them.

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We have much pleasure in publishing in this issue a paper upon the subject, very interesting and important to lawyers, of "*Res Ipsa Loquitur*," by Professor R. W. Lee, the recently appointed Dean of the Faculty of Law at McGill University. Mr. Lee has had a distinguished academic career and a variety of experience which is unusual. He is a Balliol man, and won first-class honours in the Final School of Litterae Humaniores and a Fellowship at Worcester College, after which he was a lecturer on Law at Oriel College and an examiner in the Final School of Jurisprudence, and he also subsequently took his B.C.L. degree. All of these are things which Oxford men know constitute a high order of academical distinction. Subsequently, he belonged for two years to the Ceylon Civil Service, and was for a time an Advocate in the Transvaal. From 1906 to 1915 he was professor of Roman Dutch Law at University College, London. Mr. Lee has practised since 1902 in the Judicial Committee of the Privy Council, and was of Counsel in the very recent and important appeal of *Lanier* v. *The King*,[1] in which the Board reversed the criminal sentence of the Acting-Chief Justice of Seychelles on the ground that it constituted such an invasion of liberty and such a denial of the just rights of a citizen that their lordships felt bound to interfere. Mr. Lee has already made himself known as an author, and is a contributor to the Digest of English Civil Law which we refer to elsewhere. We understand that 'An Introduction to Roman Dutch law' by him is to be shortly published by the Clarendon Press. To crown all these achievements and distinctions Mr. Lee is still a young man having been born as recently as 1868. We think every lawyer who reads his Article in the present issue will agree that McGill University is to be congratulated upon its latest acquisition.

A statement in one of the Oxford Pamphlets which are being published during the present war, namely, that an agreement has been made 'between Great Britain and America that in any future dispute between these two countries, a whole year shall elapse before any declaration of war'—may strike many of our readers with the same surprise with which, in our ignorance, it struck us when we read it. We have obtained a copy of the Treaty which was signed on September 15th, last, and has not yet been published in the Dominion

[1] [1914] A. C. 221.

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Statutes. Ratifications having been exchanged, it may be assumed that it has been approved of by the Senate of the United States. It is of surpassing interest at the present time; and Article 3 explains the foundation for the statement by the writer of the Oxford Pamphlet in question, Mr. E. A. Sonnenschein, who entitles his pamphlet 'Through German Eyes.' The effect of the Treaty is that when diplomatic methods of adjustment have failed, all disputes between the United Kingdom and the United States, of every nature whatsoever, are to be referred for investigation and report to a Permanent International Commission to be appointed as the Treaty provides, and one year from the date of the commencement of the investigation before it is to be allowed to the Commission within which to make its report. Hence Mr. Sonnenschein's statement. There is also a most interesting provision that if the British interests affected by the dispute to be investigated, are not mainly those of the United Kingdom, but those of some one or more of the self-governing Dominions, His Majesty's Government shall be at liberty to substitute as a member chosen by them to serve on the International Commission, another person to be selected by the Dominion immediately interested. This is a most material recognition of the position in, what one may call, the Constitution of the Empire, of the self-governing Dominions, in cases where their interests are specially affected.

The publication of the latest volume of 'A Digest of English Civil Law' (Butterworth & Co.), completing that section of the work which deals with the law of Property, marks the penultimate stage of this interesting attempt to present the main principles of English law in the form of a Code. The editor is Mr. Edward Jenks, Principal and Director of Legal Studies of the Law Society of London, who has been assisted throughout by four of his former colleagues of the Law Faculty at Oxford. Two Books (on Family Law and Succession) remain to complete the work, and these, it is hoped, will very shortly go through the Press. As this work is not so well known in Canada and the United States as it deserves to be, a few words may be of interest as to its scope and character. The project was originally undertaken at the initiation of the Berlin Society of Comparative Jurisprudence and Political Economy with the design of furnishing German readers with

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a statement of the rules of English Law which would cover the same ground as the German Civil Code of 1900; but the authors soon found that the English text, which was published independently of the German version, made a direct appeal to the English lawyers and to the general public. In spite of the volume of our output of legislation in recent years, the great bulk of English law—particularly in the field of Contract and Tort and scarcely less in the field of Property is still matter of Common law and derived from the study of decided cases. In *The Digest of English Civil Law* the authors have endeavoured to supply a clue through this wilderness. When the whole work is complete it is to be republished, we understand, in two volumes. In this form it should enjoy a wide popularity in Canada, and in all parts of the British Empire, where the Common Law is in force, as well as in the United States.

The Scottish Law Review for February has a good story about the new judge of the High Court, Sir Frederick Low, K.C., M.P. It will be remembered that on the death of Lord Justice Kennedy, Mr. Justice Bankes of the High Court was appointed to succeed him, and Sir Frederick Low now fills the position, formerly occupied by Mr. Justice Bankes. While the new High Court judge is not a University man he was at one of the great public schools, Westminster, though he must have found its classical associations uncongenial, judging from the incident referred to by the Scottish Law Review and which occurred between him and Sir Arthur Jelf, when the latter was on the bench as Mr. Justice Jelf. In the course of a case which Mr. Justice Jelf was trying, and in which Mr. Low was counsel, the judge indulged in a long quotation from Virgil, winding up by asking him "What he would say to that?" "My lord," he replied, "I have nothing to say, as I have not understood a word of it." "Shall I translate it?" asked the judge. "If your lordship considers it relevant," was the reply. His lordship not unnaturally, made no attempt at translation, and looked very discomfited and disgusted.

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THE CANADIAN BAR ASSOCIATION.

The first meeting of the Canadian Bar Association, which took place on March 19th and 20th at Montreal, was a great success. It was well attended by distinguished judges and lawyers from all parts of the Dominion, and it had as guests of honour Mr. James Montgomery Beck, formerly Assistant Attorney-General of the United States, and who has recently won new laurels by his book entitled 'The Evidence in the Case' in which he upholds the righteousness of the case of the Allies in the present war; and Mr. Henry D. Estabrook, the eminent New York lawyer. Sir James Aikins in his Presidential Address, which we hope to be able to give to our readers in full in our May issue, earnestly advocated the codification of our law. "Courts and legislatures," he said, "go ceaselessly on piling Pelion on Ossa, and Olympus on both, to the dismay of the bewildered lawyer and helpless people. Great points are left undecided, trivial ones receive elaborate judgments. What then is the remedy? What else can it be but to compress, to write the principles which have been settled by decision or statute in well arranged code?" The point is one upon which lawyers and theorists will never see with equal eye. In the well known case of *Wason* v. *Walter*, Cockburn, L.C.J., said:—"Whatever disadvantages attach to a system of unwritten law, and of these we are fully sensible, it has at least this advantage that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied." Perhaps the cause of codification has rather lost favour with English lawyers since the days of Bentham and Austin, and our case law system on the whole rather gained ground. Sir James Aikins, however, favours codification, and we are sure that our readers will welcome the opportunity of considering his arguments at their leisure. We shall certainly be able to give our readers, in our May number, a very able paper read by Mr. Eugene Lafleur, K.C., upon the Uniformity of the Laws of Canada, a subject which he may fairly be said to have made his own, and upon which

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he delivered an address before the Canadian Club at Ottawa on December 7th, 1912. Toronto was represented among the readers of papers by E. F. B. Johnston, K.C., who took very high ground upon the subject of "The Honour of the Profession." Perhaps one of the most interesting points in his paper was where he said—"The twisting of precedents and principles to meet the view of the advocates is considered fair argument by some counsel, and a strenuous contention along this line is often made in the hope that it may convince some member of the Court. Confidence is weakened and suspicion is aroused, professional honour is affected, and the innocent often has to suffer with the guilty." He also referred to "another matter, which is bringing the practice of the law into disrepute," namely, "the strenuous effort of many Crown prosecutors to obtain a conviction." There can be no doubt that Mr. Johnston laid down the principles consistent adherence to which makes all the difference between whether legal practice is to be an honourable profession or a miserable trade.

Mr. J. S. Ewart, K.C., in a paper on 'Federations and Confederations' expressed views of a kind which we are all familiar with in his Kingdom Papers; and contended that as Canada shakes off colonialism she will have to choose one of three courses, either to become a sister kingdom, or part of a federation, or to join in a confederation, and he explained the special features of each of these systems. The paper was interesting as all Mr. Ewart writes is, but perhaps our readers will agree with us, that the form which constitutional arrangements take, is of very small importance so long as Canada remains in heart and soul devoted to the cause of the Empire as she is showing herself in the present crisis. Mr. Beck delivered an address which has been praised on every side, upon the place of the lawyer in the community, a discourse which we understand is to be at once published in pamphlet form. One passage in it we must reproduce here, namely, that in which he said:—"The motto of civilization ought to be, 'Each for all and all for each.' Every war ought to be regarded as civil war, for civilization does exist as an inchoate organic entity, even though it has as yet no adequate political organization. The time will come when there will be in truth and fact 'the Supreme Court of Civilization,' of which I have elsewhere written, and that day may be sooner than any of us anticipate. Let us hope and

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pray that this war may be the travail of mankind, of which a better era will be born."

Mr. Beck also delivered a most witty and brilliant speech at the very successful banquet held by the Association at the Ritz-Carlton; as did also Mr. Estabrook whose subject was the strong sentiment of the Anglo-Saxon element in the United States for England and England's King, and for the ideals for which the allies are fighting in the present war. Those ideals, he declared, are the ideals of the American people, 90,000,000 of whom are in absolute sympathy with the allies. If the time comes, he said, when the American people have to fight for those ideals they will fight for them even if they have to be exterminated. Both Mr. Beck and Mr. Estabrook were made honorary members; and a resolution was proposed in very loyal terms by Mr. Johnston, and carried unanimously, to request H.R.H. the Governor-General to honour the Association by accepting membership in it.

The success of this first meeting of the Association augures well for its future.

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RES IPSA LOQUITUR.

SOME REMARKS ON THE PRINCIPLES OF CIVIL LIABILITY.*

When your President, little more than a week ago, intimated to me on your behalf the wish that I should address a few words to you on some subject of interest to lawyers, I suggested that the maxim RES IPSA LOQUITUR might prove a fruitful topic of discussion. I do not propose to address you solely or principally upon the law of this Province. It will be safer for me, a new-comer amongst you, to wing my flight towards the empyrean of Jurisprudence, and to survey the problems which the maxim suggests from a rather detached point of view. If I venture, in the course of the evening, to say anything about the law of the Province specifically, you will understand that it is in the hope of being instructed, and not with the intention of instructing others.

I take as my starting point a case briefly reported in the "Gazette" of Monday, November 9th, of this year. It is a decision of the Court of Review, confirming a judgment of the Superior Court. The newspaper headnote—if I may so call it—puts the gist of the decision with simple emphasis, in the following words:

"Failed to show fault—

So man who was hit on head by a board loses suit."

From the statement of facts which follows, it would appear that the plaintiff claimed from defendants the sum of $180 as damages because "whilst passing a building owned by the defendants, a board which was being raised to the roof became unfastened from the tackle and fell, hitting him on the head. The roofing work in connection with which the board was being raised, was being done by a contractor."

In this state of facts the Court pronounced against the plaintiff. "I should dismiss the plaintiff's action," said Mr. Justice Greenshields, speaking for himself and his colleagues, "on the sole ground that the plaintiff had failed to establish the essential allegation of his declaration; had failed to prove any fault or negligence which would call for the application of Arts. 1053 or 1054 of our Code. It was not the building that caused the accident: and the plaintiff

*A paper read to the Junior Bar Association, Montreal, November 28th, 1914.

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has failed to prove that it was an employee of the defendants who caused the accident; and has made no attempt to prove that it was any fault of the defendants themselves that caused the accident." The judgment of the Superior Court was accordingly confirmed.

There you have the text of my sermon. I shall not presume to criticise the judgment—I do not suggest that it admits of criticism. All I wish to do is to take such a state of facts as that here presented. It must have occurred many thousands of times before now, and will occur many thousands of times again, for "the thing that hath been, it is that which shall be, and there is no new thing under the sun." Let us ask then what is the juristic significance of this combination of facts and events? What is the right way to view them? What rule of law must we apply to them? These questions have an importance, I take it, independent of the positive law of this or that system. For, if I am not mistaken, the categories and classifications of lawyers are not wholly capricious and arbitrary. They are in a sense revelations and discoveries of that which exists antecedently of them, as there were flowers before there were botanists. The law is implicit in the facts. The greatest lawyer in each age is he who sees the law in the facts—and through the facts, and behind the facts—not the law of his own country merely but the law of right reason: of which the positive law of this or that country, at this or that time, may be but a pale ineffectual reflection. I do not mean that the judge administers this law of nature, but merely that he should never let it escape his mental vision.

I can see dimly what a jurist ought to be. To be it oneself is another matter. It will be safer to leave the law of nature and to get back to our heaven-descended plank. It may be useful to consider what would have been thought of it in days gone by. The history of law is not the same as legal science. But history has its uses for the jurist. It may point the way to the shrine of Themis, at least it can tell us, more or less obscurely—how, and how far with success, men have sought to find it.

Will you travel with me backwards in time to the infancy of legal history? Our *mise en scène* is simple. It may have existed in the Rome of Tarquin or in Germany as Tacitus describes it to us. A freeman going about his lawful business in town or village has been gravely injured by a beam

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dislodged from a house abutting on the road. What legal remedy is open to him? Against whom can he bring his process? The answer sounds strange in modern ears, but there is reason to believe that his recourse will be against the thing that injured him: viz.—the timber. It is a rudimentary form of action *in rem*. It is the assertion of the primitive rule of law—or lawlessness—to take vengeance on the thing that has done you hurt. There is abundant evidence of the existence in early times of this way of thinking, due fundamentally to the instinct of savages, as of children, to personify inanimate things. You will find numerous illustrations in Mr. Justice Holmes' masterly work on the Common Law. Let me add another example taken from the law of Rome, an archaic survival in the legal system of a great Empire. We have all heard of the *cautio damni infecti;* a means by which the praetor helped a proprietor to secure himself against apprehended damage if a neighbour's house was out of repair and likely to tumble down. But suppose he neglects this proper precaution and the house falls, causing him damage, had he no remedy? Remedy by action for damages he had none. But he had a more primitive right, namely, in Professor Girard's phrase "le droit de se venger sur les matériaux." It is only if my neighbour refuses to abandon the materials to my vengeance that I shall be able to make him personally responsible.

This brings one to another point. The ruinous house, the harmful timber, may have a protector, an owner; one who takes upon himself the burden of its sin; one who draws upon himself—the person—the vengeance incurred by the actual sinner—the thing. Given this state of facts, our problem becomes slightly more complicated, but it admits of an easy solution. "Pay me damages or give over your property to my vengeance" is its simple formula. It is the theory of the noxal actions of Roman Law. It is a theory, as you know, which applies not to things inanimate alone, but to animals, slaves, sons, to all forms of property. It makes the proprietor liable for the delicts of what belongs to him. It asserts, if you will, the principle of responsibility, but not of moral responsibility. You will make amends to me, if you make amends, not as wrong doer, but as owner; not because you can discern right from wrong, but because something is yours. Buy the thing and you buy your guilt. Sell the thing, and you sell your guilt. Abandon the thing and you aban-

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don your guilt. It is a theory, primitive, rude, unreflecting; and it will not alter its nature though you dish it up with doctrine or jug it up with jurisprudence.

Some of the greatest triumphs of the legal genius of Rome were won in the earlier stages of the history of Roman law. Unrestricted freedom of testamentary disposition was given by the Law of the XII. Tables in the middle of the 5th century before Christ; a provision so surprising that it has even suggested a doubt as to the assigned date of the Code which contains it. Scarcely less wonderful, I think, is the moralisation of the law of tort effected by the *Lex Aquilia*, an enactment traditionally referred to the year 287 before Christ, but probably of later date. It affords, you will remember, a remedy for injuries to property, and, as expanded by the praetor, also for injuries to the person. I am not concerned with its provisions, but with its spirit. This is expressed in a passage from the Institutes of Gaius (Lib. iii., 84), which I will read to you:—

"Is injuria autem occidere intellegitur cujus dolo aut culpa id acciderit, nec ulla lege damnum quod sine injuria datur reprehenditur: itaque impunitus est qui sine culpa et dolo malo casu quodam damnum committit:" "A person is said to cause death wrongfully when he causes death with intent or by neglect; and no statute penalises harm which is not caused wrongfully, and so if anyone does harm to another without negligence and without wrongful intent he is unpunished." The law, therefore, punishes damage caused with intent, and damage caused by neglect. It exempts from liability the innocent author of an inevitable accident. There, in two sentences, you have the mature Roman law of Delict or Tort, the source, if I am not mistaken, of all our modern systems, which derive their principles, through whatever channel, from the law of Rome. We have no need to go far afield for an example. Look at art. 1053 of the Civil Code of the Province:—"Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another whether by positive act, imprudence, neglect or want of skill." The phrasing is modern, but the ancient source from which the law is taken is unmistakable.

I have said that the *Lex Aquilia* moralised the Roman law of Delict. Speaking generally it did so, but one institution escaped it, survived in the system as a legacy from prim-

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itive man. This was noxal surrender. For the wrongful acts of his sons, slaves, cattle, dogs and chimney-pots the father or owner remained liable with the alternative of repudiating liability together with ownership. That this primitive notion was thoroughly out of harmony with the mature thought of Roman law clearly appears from the embarrassment which it occasions to the jurists. Justinian got rid of noxal surrender in the case of sons, and thereby departed from the idea that a father was answerable for his son's delicts. The proprietor, however, continued to be liable for mischief done by his slaves, his cattle, his dogs and his immoveables.

Let us now turn in another direction and consider the principles of liability in the Common Law. Sir Frederick Pollock examines them in the first chapter of his book on Torts. He finds that the acts or omissions which English law regards as tortious may be referred to one or other of three principal groups. In the first group, generally speaking, the wrong is wilful or wanton. The legal wrongs under this head are such as to be also the object of strong moral condemnation, such as assault, seduction, defamation, deceit. In the second group the element of blame is absent or at any rate indifferent. Typical wrongs of this kind are—trespass to land and to goods, conversion, disturbance of easements. In the third group the acts or omissions complained of, have a kind of intermediate character. "They are not as a rule wilfully or wantonly harmful; but neither are they morally indifferent, save in a few extreme cases. The party has for his own purpose done acts or brought about a state of things, or brought other people into a situation, or taken on himself the conduct of an operation which a prudent man in his place would know to be attended with certain risks. A man who fails to take order, in things within his control against risk to others which he actually foresees, or which a man of common sense or competence, would in his place foresee, will scarcely be held blameless by the moral judgment of his fellows."

The learned author goes on to explain the second group of wrongs as an intrusion into the field of Tort of a class of actions designed to protect ownership, actions directed to the assertion, not of guilt on the part of the defendant, but of ownership on the side of the plaintiff. If this disturbing factor be left out of account, we find the fundamental princi-

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ple of liability in English law to be the same as in the Roman law; viz.—wrongful intention and culpable negligence. Exceptions apart (of which later), the English law, no more than the Roman law, countenances the idea of absolute liability dissociated from the notion of moral blame. I am not liable as owner, though my property may be a cause of mischief to others. I am not liable as father, though my son may do harm to others. Further, the standard of diligence demanded of me does not lie outside the reach of normal human endeavour. This has been well expressed by Professor Salmond in the following passage:—[1]

"We have first to notice a possible standard of care which the law might have adopted but has not. It does not demand the highest degree of care of which human nature is capable—I am not liable for harm ignorantly done by me, merely because by some conceivable exercise of prudential foresight I might have anticipated the event and so avoided it. Nor am I liable because, knowing the possibility of harm I fail to take every possible precaution against it. The law demands not that which is possible, but that which is reasonable in view of the magnitude of the risk. Were men to act on any other principle than this, excess of caution would paralyse the business of the world. The law, therefore, allows every man to expose his fellows to a certain measure of risk and to do so even with full knowledge. If an explosion occurs in my powder mill, I am not liable for negligence, even though I established and carried on the industry with full knowledge of its dangerous character. This is a degree of indifference to the safety of other men's lives and property which the law deem permissible because not excessive. Inasmuch as the carrying of firearms and the driving of horses are known to be the occasions of frequent harm, extreme care and the most scrupulous anxiety as to the interests of others would prompt a man to abstain from these dangerous forms of activity. Yet it is expedient in the public interest that men should be exposed to the incidental risks of them. Consequently the law does not insist on any standard of care which would include them within the limits of culpable negligence. It is for the law to draw the line as best it can, so that, while prohibiting unreasonable carelessness, it does not at the same time demand unreasonable care."

[1] Jurisprudence, 4th ed., p. 355.

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The above-stated principle admits certainly of some qualification. The archaic rule of a man's liability for mischief done by his trespassing cattle has left its mark upon the modern law to the extent that I am liable for such harm consequent upon their escape as might be expected to occur. On the one hand I shall not escape liability by showing that I took every reasonable precaution to keep them in; on the other hand, however careless I was in letting them out, I cannot be held responsible except for mischief which was the natural and probable consequence of their escape. I am also liable for the tortious acts of my servants done in the course of my employment, not because of any inherited tradition of a master's liability for harm done by his slave, but—to quote Prof. Salmond again—because of "the legal presumption gradually become conclusive that all acts done by a servant in and about his master's business are done by his master's express or implied authority, and are therefore the acts of the master for which he may be justly held responsible."[2] Further, the principle which makes a man liable for his trespassing animals has received a wider extension in the well-known rule in *Rylands* v. *Fletcher*,[3] according to which as stated by Lord Blackburn: "a person who for his own purpose brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so is, prima facie, liable for all the damage which is the natural consequence of its escape." This is perhaps the only point at which the English law recognizes the principle of absolute liability. But later decisions have qualified the generality of the rule, which has not been accepted in all Common Law jurisdictions, and which may perhaps before long call for fundamental restatement.

We come back to the general principle that a man is not answerable for unintended harm unless the harm was such as a prudent man in his situation would have foreseen and guarded against. In other words, plaintiff must prove negligence. It is not enough for him to show that the event which caused him damage *may* have been due to negligence, nor even that it was just as likely to have been due to negligence as not. He must produce *reasonable proof* of negligence, i.e. a balance of probability in favour of the hypothesis of negli-

[2] Salmond, Jurisprudence (4th ed.), p. 375.
[3] (1868), L. R. 3 H. L. 330.

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gence such as is sufficient to determine the judgment of a reasonable man.

Here at last, we find ourselves in contact with the rule *res ipsa loquitur*. It is not a rule of law nor a presumption of law; but a rule of common sense, an inference from common experience. If a plaintiff says that he has suffered harm through the carelessness of a defendant he must prove his case. He must show—1, That he has been injured (the fact); 2. How he was injured (the event); 3. The circumstances of the injury; 4. The act or omission of the defendant which he alleges to be the cause of the injury and to be culpable.

Now the last element in the series—the act or omission—may be proved by human testimony, or may be matter of inference from the event and the circumstances. Of course, the act is itself, or the facts which indicate omission are themselves, part of the circumstances. But when we speak of circumstances we commonly intend just so much of the surroundings of an event as serve to present to the mind a picture of what took place. The event, together with such surroundings, we term the "accident," and this I think is what is meant by "res" in the maxim cited.

Now, some accidents are of such a nature as to suggest at once an inference of human activity or inactivity as the probable cause, while others are not of this nature. In the leading case of *Byrne* v. *Boodle*,[4] the plaintiff was walking in a public street past the defendant's shop when a barrel of flour fell upon him from a window above the shop and seriously injured him. In the course of argument in the Exchequer Chamber, Pollock, C.B., said: "There are certain cases in which it might be said *Res ipsa loquitur*, and this seems one of them." The same learned judge, in giving judgment said: "We are all of opinion that the rule must be absolute to enter the verdict for the plaintiff. The learned counsel was quite right in saying that there are many accidents from which no presumption of negligence can arise, but I think it would be wrong to lay down as a rule that in no case can presumption of negligence arise from the fact of an accident. Suppose in this case, the barrel had rolled out of the warehouse and fallen on the plaintiff, how could he possibly ascertain from what cause it occurred? It is the

[4] (1863), 2 H. & C. 723.

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duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would beyond all doubt afford prima facie evidence of negligence. A barrel could not roll out of a warehouse without some negligence and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous. So in the building or repairing a house or putting pots on the chimneys, if a person passing along the road is injured by something falling upon him, I think the accident alone would be, prima facie, evidence of negligence. Or if an article calculated to cause damage is put in a wrong place and does mischief, I think that those whose duty it was to put it in the right place are, prima facie, responsible, and if there is any state of facts to rebut the presumption of negligence they must prove it."

In the later case of *Scott* v. *The London & St. Katherine Dock Co.*,[5] the circumstances were very similar. Six bags of sugar fell upon the plaintiff, an officer of the Customs, when in the discharge of his duty, he was passing in front of a warehouse in the Docks. The Exchequer Chamber, by a majority of four to two, held that there was sufficient evidence of negligence to go to the jury. Erle, C.J. said: "The majority of the Court have come to the following conclusion. There must be reasonable evidence of negligence. But when the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

Another case—and the last I shall mention—is *Kearney* v. *London & Brighton Ry. Co.*[6] As the plaintiff was going along a highway under a railway bridge the property of the defendants, a brick fell from the top of one of the piers of the bridge and injured him. It was held by the unanimous judgment of the Exchequer Chamber that the defendants were bound to keep the bridge in proper repair so as not to injure persons passing along the highway and that there was evidence from which a jury might infer negligence.

It is unnecessary to multiply instances. The result of the cases may be stated in the language of Prof. Salmond. "The

[5] (1865), 3 H. & C. 596.
[6] (1871). L. R. 6 Q. B. 759.

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Maxim '*Res ipsa loquitur,*'" he writes, "applies whenever it is so improbable that such an accident would have happened without the negligence of the defendant that a reasonable jury could find without further evidence that it was so caused."[7] The only modification I would suggest of this statement is the addition after the words "of the defendant" the words "or of some person for whose negligence he is responsible." In many—perhaps most—of the cases to which the maxim has been applied, this vicarious liability would include the acts and omissions of an independent contractor.

Before concluding this paper I shall add a few remarks on the law of this Province. I shall refer but to two cases. The first is the well-known case of *The Shawinigan Carbide Co., Appellants* v. *Jean Doucet, Respondent,* decided in 1909 by the Supreme Court of Canada, in Appeal from the Appellate side of the Court of King's Bench of the Province of Quebec.[8] The second is the case of *Dame Hannah Irwin* v. *The Grand Trunk Railway Co. of Canada,* which came the other day before the Superior Court in Review and has not yet been reported.

With a detailed statement of the facts of the two cases I do not purpose to trouble you. In each there was an explosion; in the one case in a furnace, in the other case in a locomotive. The element common to both of them is the fact that there was very little evidence to show why the accident took place. In the first case, but not in the second, the Court entered fully upon the question of the liability of the owner of a furnace, steam-engine, or any other such appliance, which has suddenly exploded and caused injury to an employee engaged in working it, the accident not being attributed to any apparent neglect of the owner or of those for whom he was responsible. The question is one of the interpretation of Articles 1053 and 1054 of the Code. The first of these, which I have already cited, seems to lay the foundations of all liability in what the commentators call "la faute aquilienne." Article 1054, however—(I quote the English version)—continues, "He (that is, every person capable of discerning right from wrong) is responsible not only for tthe damage caused by his own fault, but also for

[7] Salmond, Torts, (3rd ed.), p. 32.
[8] 42 S. C. R. 281.

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that caused by the fault of persons under his control and by things which he has under his care (et par les choses qu'elle a sous sa garde)."[9] The last words have occasioned great difficulty. According to one view, they have no independent value of their own and must be regarded merely as an index-finger pointing to article 1055,[10] which specifies two, and only two, cases in which a man is responsible for things under his care: viz. 1. in respect of his animals, and 2, within limits, in respect of his building. On another view the responsibility of a person for things *sous sa garde* is either absolute, or qualified only by para. 6 of article 1054, which says that "responsibility attaches in the above cases (under which on this hypothesis the general statement of liability in para. 1 of this article would be included) only when the person subject to it fails to establish that he was unable to prevent the act which has caused the damage."

Scarcely distinguishable from this last view, I think, is the doctrine which affirms that a person who has things under his guard is answerable only for his fault, but that para. 1 of art. 1054 raises a legal presumption of fault, which, however, may be displaced by proof that the cause of the injury was attributable to the fault of the person injured; to *vis major;* to pure accident; (or that it occurred without fault imputable to the defendant?) For the discussion of these interesting problems I must be content to refer you to the judgments of Chief Justice Sir Charles Fitzpatrick, and of Girouard, Duff and Anglin, JJ., in the Supreme Court. Three remarks only I will venture to add. The first is that, —so far as I am able to judge—the whole question of the construction of arts. 1053 and 1054 of the Civil Code is still

[9] The article continues:—
"The father, or, after his decease, the mother, is responsible for the damage caused by their minor children,—Tutors are responsible in like manner for their pupils;—Curators or others having the legal custody of insane persons for the damage done by the latter:—Schoolmasters and artisans, for the damage caused by their pupils or apprentices while under their care.—The responsibility attaches in the above cases only when the person subject to it fails to establish that he was unable to prevent the act which has caused the damage.—Masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work for which they are employed."

[10] Art. 1055. The owner of an animal is responsible for the damage caused by it, whether it be under his own care or that of his servants, or have strayed or escaped from it.—He who is using the animal is equally responsible while it is in his service.
The owner of a building is responsible for the damage caused by its ruin, where it has happened from want of repairs or from an original defect in its construction.

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open for judicial decision. This conclusion seems to follow from the judgment of the Superior Court in Review in *Irwin* v. *The Grand Trunk Railway*. In that case Beaudin, J., speaking for himself and his colleagues, with reference to exceptions raised by defendant's Counsel to the Trial judge's construction of Article 1054, said: "I am of opinion that the question cannot be raised in the present case because the jury find a specific and positive fault against the defendants and their verdict was given under Article 1053 and not under Article 1054. It is probably fortunate for the Court that we are able to come to this conclusion because we would have had to choose between the opinion of many eminent judges who have expressed their opinions on the point in Doucet's case, but the majority of them were able to come to a decision by finding a fault against the defendants, and the judgment of the Court of Appeal was confirmed by the Supreme Court for that reason."

The second thing I have to say is this. Whatever may be the proper construction of art. 1054, it has nothing whatever to do with the maxim *res ipsa loquitur*. The clause which makes a person "responsable du dommage causé par les choses qu'elle a sous sa garde" either: (a) means nothing; or (b) expresses a rule of law; or (c) creates a presumption of law. But the maxim *res ipsa loquitur*, as we have seen, expresses an inference of fact and of common sense or (to use Duff, J.'s phrase) of "right thinking."

Thirdly, while I agree that a judge who administers a Code must interpret the law as he finds it, must infer the intention of the legislator from the language used, this rule of construction does not, I submit, require him to consider each rule of law as if it existed *in vacuo*. On the contrary, every rule of law, whether the law be codified or not, has its place in a system; is a drop in a stream of tendency. To bear this truth in mind and to apply it in the construction of a statute is not to ignore the language of the legislator but merely to interpret that language by the established canons of legal thought. With this reflection in my mind, I find it hard to believe that the Civil Code of this Province has, by a few unguarded words, generalized the aboriginal rule which made a man responsible for his property, with or without the qualification that he may escape liability for an accident by showing that he was utterly free from blame.

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After all, there is nothing criminal in owning property. Many good men have done so. If the industrial circumstances of the time make it desirable that workmen should be compensated in the event of injury by accident, let the legislature—as it has already to some extent done—provide for new conditions by new legislation.

ADDENDUM.

For further discussion of the topics dealt with in this paper the reader is referred to "The Modern Conception of Civil Responsibility," by Mr. P. B. Mignault, K.C.; *Journal of the Society of Comparative Legislation* (1910), No. XXIII., p. 102, and to "La responsabilité du fait des choses devant la cour supérieure [sic] du Canada,' par M. R. Saleilles, *Revue Trimestrielle de droit civil* (1911) tom. X., p. 23.

R. W. LEE.

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THE WORKMENS COMPENSATION ACT, 1914.

The purpose of the following Article is to trace the history of Workmen's Compensation and Employers' Liability Laws from the original idea concerning same in England through each stage of development down to the present Act in Ontario which came into force on January 1st of this year (1915), giving some of the underlying reasons which it has been considered, made such laws necessary and a comparison of our law with somewhat similar enactments in other jurisdictions.

The first system of compensation for injuries in England was adopted from the Roman law. It was however a judge-made law of gradual growth and development, now spoken of as the Common law. The principle of this law may be expressed by the maxim—*"Sic utere tuo ut alienum non laedas"*—in other words, it is the duty of everyone to so govern and regulate his own conduct, that he shall not occasion injury to others. This law applied, however, only to personal injuries, the doctrine that a personal action dies with the person, or as expressed by the maxim—*Actio personalis moritur cum persona*—having been the settled law of England down to the year 1846. Prior to that date no consideration whatever was given to the claim of dependants of a deceased workman killed in the course of his employment even though the employer was negligent.

LORD CAMPBELL'S ACT.

To provide a remedy for this apparent injustice, a law was passed in England in the year 1846, commonly referred to as Lord Campbell's Act, 9-10 Vict. Ch. 93. In the following year (1847) a similar Act was passed by the old parliament of Canada, 10-11 Vict. Ch. 6, now known as the Fatal Accidents Act, R. S. O. 1914, ch. 151. The statutory title of this Act was as follows: 'An Act respecting compensation to the families of persons killed by accident and in duels.' Strange to say the Act itself did not say a word about duels but it applied in general terms to the death of a person caused in any way by the wrongful act of another, and it gave right of action in the name of the personal representative of the deceased, but the action was to be for the benefit of certain specifically named dependants.

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COMMON LAW DEFENCES.

Under these two systems, viz.: at Common law in personal actions, and under Lord Campbell's Act in fatal cases, there developed certain defences which rendered it increasingly difficult for an injured workman or the dependants of a deceased workman to recover damages against the party or company causing the injury. A brief reference should be made to these.

First.—The Doctrine of Contributory Negligence. The principle of this doctrine was that if the plaintiff by the exercise of ordinary care could have avoided the consequence of the defendant's negligence, he was not entitled to recover. Thus, for example, if a man driving recklessly along the street ran down a pedestrian, it was a good answer to an action by the latter against the former to say "true I know I was negligent but you were negligent after I was, you could have got out of the way and avoided the consequence of my wrongful act." This question was always one of fact for the jury, but where this fact was found against the plaintiff, as a matter of law he must be non-suited.

Second.—The Doctrine of Common Employment or the Fellow Servant Rule. Where two workmen were hired by the same employer, the latter could not be held responsible for injury to one of these workmen caused by the negligence of the other.

Third.—The Doctrine of Assumed Risk. Under this doctrine, which is closely associated with the fellow servant rule, a workman was supposed to enter the service of an employer on the implied understanding that he ran all the risks ordinarily incident to the hazard of the employer's business.

These defences, it was found, operated to relieve the employer from all liability in a very large number of cases, and their manifest unfairness soon began to impress itself on the minds of right thinking people who made a study of the subject.

It was contended that inasmuch as the workman was not usually in a position to bargain with his employer, it was unjust for the Courts to continue holding that he assumed the risk of his occupation. He could not do otherwise: very few workmen could choose their occupations; they had to work or starve and the average man must work where work

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is available and under conditions entirely of the master's making.

It was also urged that it was unfair to apply the fellow servant rule where negligence was that of an employee of a superior grade of employment, against whom the workman could not possibly protect himself.

In the matter of contributory negligence, it was also considered very unfair that a man, for example, who in a moment of fatigue failed to respond with the same speed and regularity as the machine which he operated, should be denied his right to recover damages where he lost a hand or a finger as the result.

THE FIRST EMPLOYERS' LIABILITY ACT.

An attempt was made therefore to further improve the law in England in the year 1880 by the adoption of the first Employers' Liability Act. An almost similar Act was passed in Ontario in the year 1886 known as 'the Workmen's Compensation for Injuries Act.' The main difference between the system under this law and under the Common law system was—

First.—It made the master liable for the negligence of a fellow servant of an injured workman, provided that fellow servant was not an ordinary workman, but one having some authority or superintendence over the injured workman. In the case of railways the relieving clause was extended much further to apply to cases where the negligence was of some fellow employee such as telegraph operator. engineer, conductor or switchman who had charge of signal points, engine or train.

Second.—It also relieved the workman from the effect of the former doctrine of assumed risk to this extent that the master was made liable should it be shewn that there was any defect in the condition or arrangement of the ways. works, machinery or plant of the employer which defect was the cause of the accident.

In these respects this Act was a great boon to the workman as compared with the difficulties against which he had to contend at Common law.

There were two provisions of the Act, however, which were specially satisfactory to the employer.

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First.—He was relieved from the danger of a very large verdict against him, the limit being placed at $1,500, in any case, or a sum equal to three years' wages of the workman, whichever should be the greater, and

Second.—The action must be brought within six months or the workman absolutely lost his right of recovery.

It should be noted, however, that in passing this law the Common law remedy was not taken away, and a workman in bringing action could plead at Common law as well as under the statute.

As a matter of practice, however, it has been held only in a very small percentage of cases in recent years, on account of the defences above referred to, that a plaintiff could fit his facts so as to get a Common law verdict, and it became necessary in practically every case to prove "defect in system" before a plaintiff could get to a jury on his Common law plea. *McDougall* v. *Ainslee,* 42 S. C. R. 424.

It should also be noted that under this Act of 1886 contributory negligence was as good a defence as it was at Common law, and the defence of Common Employment and Assumed Risk still prevailed except as stated above.

Somewhat similar Acts were in due time passed by the other Provinces of Canada as follows: British Columbia in 1897, Nova Scotia in 1900, Manitoba in 1902, New Brunswick in 1903.

The Effect of Grove v. Wimborne.

A further obligation was imposed upon Employers in 1898 by a decision of the Court of Appeal in England in the case of *Grove* v. *Lord Wimborne.*[1] This case held the employer liable to his workmen, in damages, for injuries sustained as the result of the breach of a statutory duty, as, for example, the duty under the Factory Act to guard dangerous machinery. This case has been followed in all our Ontario decisions on the subject since that date.

Under this new system, however, (Law of 1886), much as it was an improvement on the old Common law system in many respects—negligence, fault, and wrong, were its underlying principles. It was necessary in every case to consider and trace the cause and responsibility for the accident. The plaintiff was required always to prove negli-

[1] [1898] 2 Q. B. 402.

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gence on the part of the master or his superintendent or foreman, o: since the decision in *Grove* v. *Wimborne* above referred to, the breach of some statutory duty.

Negligence as a pre-requisite to recovery of damages was no doubt appropriate to the conditions which prevailed when this law of 1886 was passed, as it was at Common law, because most of the accidents which happened in those days were due to want of care on someone's part, but it was urged in recent years by careful students of the subject that this test of negligence is wholly unsuited to present day conditions, because a very large proportion of the accidents of today are due to general conditions for which no one is directly responsible. So long as negligence was the determining principle, there could be no recovery in case of those accidents (and they are very numerous) which are due to lack of ability or skill, misjudgment, ignorance, thoughtlessness, inadvertence, and so many others of a somewhat similar nature which are inevitable at times with the most careful of men.

The verdicts in all these cases which came to trial were left to the discretion of the jury, unlimited as to amount if the plaintiff's Common law plea prevailed, but limited under the Statute, to $1,500 or three years' wages as above indicated. The result was that many employers were compelled to pay excessive damages, but on the other hand a very large number of workmen, fearing the uncertainty, anxiety and expense incident to litigation, either received no compensation at all or were induced to settle for a sum much less than that which fairly represented the damages sustained.

Modern industry, however, has produced such a condition of things in practically all the great industrial countries of the world that legislators have been faced with the necessity of dealing fairly and humanely with the thousands of unfortunate victims of industrial accident. In the United States statistics shew that over three thousand men are killed every month in this way; half a million annually are made cripples, and over two million a year are more or less seriously injured. I have not the exact figures before me for our own Province but in proportion to our population and industrial activity, I imagine these figures fairly represent conditions here.

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With the application of machine methods to new fields of industry, the increasing employment of women, children and untrained immigrants in mechanical occupations, the number of these accidents in normal times is not likely to diminish.

The laws by which these accident cases until now have been treated, intended as they were for the simpler conditions of half a century ago when manual tools were to a much greater extent in use, have long since been considered quite unsuited to the conditions of the present day with all its complex appliances, with the great expansion of the uses to which electricity is put, with the use of so much rapid moving and dangerous machinery, with the working of men in large groups and under crowded conditions and with driving methods adopted in many cases, under efficiency experts, to accomplish capacity results.

Commission to Investigate the Subject.

It was the recognition of this fact which led the late Premier of the Province, Sir James Whitney, about five years ago to ask the legislature for authority to appoint a Commission to investigate conditions with regard to this question. Sir William Meredith, Chief Justice of Ontario, was appointed to this Commission. After three years work, during which a very complete and exhaustive study was made of the subject, he presented his report and recommendations. This was in the form of a draft Act. which after much discussion, and with some alterations and modifications, was finally passed by the Legislature at the 1914 Session, and it became fully effective January 1st last.

English Workmens Compensation Act (1906).

Before proceeding to explain the principles of this new law in Ontario, I should say that in the year 1906 an entirely new Workmen's Compensation Law was adopted in England. This law does away almost entirely with the question of negligence, fault and wrong, as important factors in connection with industrial accidents and gives compensation to every workman injured, or the dependants of a workman killed by *accident happening in the course of* and *arising out of his employment.* Compensation is based

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on the average earnings of the workman and claims under the Act are tried before a County Court Judge.

Study of the Subject in United States.

During the years following the passage of the English Act of 1906, an agitation to have compensation laws took aggressive form in the United States. The Federal Government in the year 1910 appointed a Commission to investigate the various systems of Workmen's Compensation in America as well as in Europe. The report of this Commission forms a very interesting and instructive volume for any one desirous of pursuing a more complete study of the subject. A bill based upon the report of this Commission passed the United States Senate at the Session of 1912-13. The bill was substantially amended in the House, and as the two Houses could not adjust their differences on the subject, the bill was not passed. Attempts have been made in each succeeding Congress to put this bill through but so far without success.

Twenty-four of the States of the Union, however, have adopted Compensation laws of their own. It is interesting to note that no two of these laws are exactly alike. They differ in amount of compensation, in the matter of medical attention, in length of the waiting period and in various other details, but all of them embody the fundamental principle similar to that in the English Act of 1906, viz.: that compensation is to be paid for all injuries regardless of fault.

Important Provisions of the Ontario Act.

I will now endeavour to point out briefly some of the main principles of the Ontario Law and incidentally compare it with the English Law of 1906, as well as with the Laws of some of the States across the line.

The Act divides the employers of the Province into four classes.

First: those specifically included by the Act itself or by regulation of the Board in Schedule I. of Part I.

Second: those included in Schedule II. of Part I.

Third: the employers of farm labourers, domestic or menial servants (see sec. 109.)

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Fourth: All employers not included in some one of the three classes above stated.

In the first class is included the great body of manufacturers and contractors, and those engaged in the lumbering and mining industry.

The second class consists principally of the railway, steamship, telegraph and telephone companies, municipal corporations and public utility commissions.

The third class includes mainly farmers and householders with relation to their domestic help.

The fourth class is mostly made up of those engaged in wholesale and retail mercantile businesses, but it includes all industries not included by the Act in Part I. as well as those excluded by regulation of the Board from the operation of Part I. of the Act.

The first and second classes above referred to which constitute Schedules I. and II. respectively, are the only industries included in Part I. of the Act. The third class does not come under the Act at all. The fourth class includes all the industries in Part II. and their rights in respect to injuries sustained in course of their employment must be determined as at Common law or under Lord Campbell's Act, (the Fatal Accidents Act) as the case may be, with the former defences available for the employer, taken away and contributory negligence being merely a ground for reduction of damages.

The administration of Part I. of the Act is placed under the exclusive jurisdiction of a body known as the Workmen's Compensation Board. From the decision of this Board there is no appeal except to the Board itself by way of request for reconsideration.

Claims under Part II. of the Act, that is the fourth class above referred to, as well as claims against employers comprised in the third class aforesaid, are heard and determined in the Courts as heretofore.

System entirely new in Canada.

The system of compensation provided for in Part I. is entirely new in Canada. In that it eliminates negligence as a necessary pre-requisite to compensation it resembles the new English Law as well as all the compensation laws so

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far adopted in the United States. While a very wide discretion is left with the administering Board, the amount of compensation to be paid in most cases is fixed by certain fairly well defined provisions. The rate of compensation in all except fatal cases is 55% of the "average earnings" of the workman prior to the accident, and even in fatal cases where a stated sum not exceeding $40 a month for all dependants is fixed, this is only fixed as a maximum figure, the amount of compensation payable being this stated sum or 55% of average earnings of deceased whichever amount is the less. Compensation is payable in periodical amounts weekly or monthly *during the whole period of disability, even for the life of the workman* if he should be totally or permanently disabled.

The Ontario Act in this respect, that is, in length of time during which compensation is paid, resembles the English Act as well as the Acts of New York, Illinois, Washington, Oregon, California, Kentucky, West Virginia, Maryland and Nevada.

It may be interesting to note the different and varying percentages of wages on which compensation is based, in various jurisdictions by comparison with the Ontario rate of 55%. England 50% with one pound per week as maximum. Sixteen of the State laws have adopted the 50% rule with $5 as a minimum and $10 as a maximum weekly amount. New York, Massachusetts and Ohio adopt the 66⅔% rule; Wisconsin and California 65% and Nevada 60%. Washington and Oregon have a rate varying according to the size of workman's family and providing for payments not to exceed 60%.

The Law in Fatal Cases.

In Fatal Cases under the Ontario Act, subject as stated above to the 55% rule, the widow if there be one gets $20 per month for life, and if there are children $5 per month is paid for each child under 16, not exceeding in the whole $40. If there is no widow, but children, they, in such cases get $10 per month each. Should the widow remarry, she gets a final payment of two years' pension as a lump sum. It was apparently considered good business as well as in accord with public policy to thus encourage remarriage.

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The corresponding provision in the English Act gives dependants a sum equal to three years' previous wages of the workman or £150 whichever is the greater, but limited to the maximum sum of £300.

No compensation is payable in respect to accidents unless they cause disability for at least seven days, but if disability lasts that long, compensation is payable as from the date of the accident.

In England the corresponding waiting period is two weeks.

A sum not exceeding $75 is payable in all fatal cases on account of funeral expenses but nothing is payable for medical or hospital expenses in any case, except where there are no dependants whatever. Our law in this respect while similar to the English Act is unlike nearly all of the American laws. In only one State, viz.: New Hampshire, is there no provision made for payment of medical expenses.

THE ACCIDENT FUND.

The main point wherein the Ontario Law differs from the English Law as well as from most of the American laws, is in that under Schedule I. of Part I. the problem of security for payment of the compensation is met by the creation of an Accident Fund, administered by the Board and contributed to by employers under this schedule on the basis of a percentage of their total annual payroll. All compensation awarded in this Schedule is payable out of this Fund. Employers in this schedule are divided into 35 classes and each class constitutes under the administration of the Board a sort of mutual co-operative insurance society. A similar system of State Insurance has been adopted in the States of Ohio, Washington, Nevada, Oregon and West Virginia.

INDIVIDUAL LIABILITY IN SCHEDULE II.

In Schedule II. the liability to pay compensation is upon the employer individually but all claims in this schedule are dealt with the same as in Schedule I., except that in certain cases where disability does not last longer than a month the employer may settle with his injured employee

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direct. The Board may require any employer in this Schedule to carry Liability Insurance as a guarantee of the payment of compensation.

Lump sum settlements are not necessarily required to be made under either of the Schedules, and while the Board is given discretion in the matter, the policy of the Board is to make compensation payments on a periodical basis. It is thought, as Sir William Meredith in his report to the Lieutenant-Governor in Council on this subject said: "The payment of a lump sum is contrary to the principle upon which Compensation Acts are based and is calculated to defeat one of the main purposes of such laws, viz., the prevention of the injured workman becoming a burden on his relatives or friends or on the country."

I cannot conclude this Article better than by quoting from an eminent American writer on this subject, referring to the laws of the various States. His words are equally appropriate here. "It cannot be claimed," he says "that any of the American statutes thus far are perfect Compensation Laws or that they fully meet the requirements of our industrial conditions, but in justice to the legislatures and the commissions whose work we have been considering, it should be said that most of the faults of existing laws are due to the very novelty of the principle involved, to the want of adequate data upon which to proceed and to the lack of an intelligent public opinion upon the subject. For 25 years European Countries have been extending the scope and increasing the efficiency of their Compensation Laws and a similar course will no doubt be followed in this Country. It is unfortunate that we cannot profit more by the experience of Europe but our institutions differ and we have Constitutions to consider, but any way the approved practice of legislatures in this Country" (meaning of course the United States) "seems to be the method of trial and error. With all the shortcomings, however, of present Compensation Acts, they are so far superior and so much better suited to modern conditions than was the old system, that not a single State has thought of changing back to the old order of things. Compensation regardless of fault and according to a pre-determined and fixed schedule has come to stay, and with the work now being done by State Commissions, and with the improvements being made on existing laws by amendment, it is but a matter of a few years when every

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State will have a Compensation Law of which it can well be proud and which will deal justly with the man, who works that we may enjoy the fruits of his labour."

I sincerely hope that the time will come in Canada when the various Provinces will have uniform Compensation Laws so that no question can arise as to which Province gives the employee the best basis of compensation or which makes it easiest for him to recover compensation, but laws of which we shall all be proud, laws which deal justly not only with the man who works but also (and this is just as important) with the great body of employers as well.

New times demand new measures and new men.
The world advances and in time outgrows
The laws that in our fathers' days were best;
And doubtless after us some purer scheme
Will be shaped out by wiser men than we
Made wiser by the steady growth of truth.

GEORGE A. KINGSTON.

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OLLA PODRIDA AND THE COMPANIES ACT.

The Dominion Companies Act, R. S. C. 1906, ch. 79, is a very good piece of legislation, as is apparent from the fact that it stands the wear of time without annual tinkering,—partly accounted for by the liberality and at the same time comprehensiveness of its provisions,—for sometimes in a conscientious but perhaps mistaken particularity, the draftsman loses the advantage of a greater breadth of treatment.

PROXIES.

Take for example, the subject of proxies as treated first in the Dominion Act and next in the Ontario Act; in the former the right to vote by proxy is incidentally worked into one of the sections on meetings (88(b)) in the words:—

> " . . . votes may be given in person or by proxy if such proxy is himself a shareholder."

Nothing more is necessary, nor as one should think, desirable; whereas in the Ontario Act, and perhaps also company acts of other Provinces, the subject is complicated by "*verboten;*" *inter alia,* a prohibition (sec. 51 (4)), which raises a serious question as to the validity of a proxy if indeed it does not wholly invalidate it, against the proxy containing anything but the appointment of a proxy or a revocation of a former proxy; and another provision (sec. 51 (1)) terminates the proxy's validity after one year from date. However, not to make this Article, which is intended to deal with a few features of the Dominion Act, a comparison of the Dominion and provincial Acts, which while certainly most interesting and useful, would require a good sized pamphlet in space, some odds and ends of the former may be noticed.

FORFEITURE OF SHARES EFFECTING A REDUCTION OF CAPITAL.

The reduction of either the nominal or subscribed capital is not intended to be brought about except by the authority of supplementary Letters Patent, after a directors' by-law has been passed for the purpose, and approved by the shareholders (secs. 54-57), nevertheless by the exercise of the

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right to declare the forfeiture of shares for non-payment of calls (sec. 62) the shares again become the property of the company and withdrawn from the public, thus in effect producing a reduction of the subscribed capital of the company. There is no provision in the Companies Act requiring the subscribed capital to be maintained at any given proportion of the nominal capital, but as the rule is that a company cannot deal in its own shares, that is re-acquire and sell them, the forfeiture power operates as a legalized exception to the rule. An anomaly is found in the position of companies under the Ontario Insurance Act (R. S. O. 1914, ch. 183, sec. 62), with respect to the matter of the reduction of the subscribed capital, for in that case while such capital must be in the first place subscribed, and probably maintained, at not less than the statutory amount, yet the same right of forfeiture exists under sec. 245 of that Act, and sec. 62 (3) of the Ontario Companies Act, read together, and therefore the express requirement of the statute is, by force of the forfeiture clause, annulled for the purposes of that clause, and the reduction of the subscribed capital in such circumstance is not illegal.

DIRECTORS AND THE BALLOT.

Every election of directors shall be by ballot, so says sec. 78 (b) of the Dominion Companies Act. In case of a vacancy occurring casually between annual (or biennial) meetings, it may become necessary to fill it. Must this be done by ballot? It depends upon whether it is an "election" or not within the sense of sec. 78 (b). The question is both illumined and clouded by sec. 78 (c) which says that a vacancy may be "filled" for the remainder of the term by the directors, and while sec. 78 (c) eschews the use of the word "elect," it does not also say that in such case a ballot is not necessary. Yet the board of directors may "elect," as well as the shareholders, for sub-sec. (d) says the directors shall "elect" a president, and only uses the word "appoint" with reference to other officers of the company. Sec. 73 adds to the interest of the matter by enacting that the provisional board shall be the directors until replaced by others duly "appointed" in their stead, which word in the circumstances means "elected," and finally sec. 75 says no person shall be "elected" as a director or "appointed"

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as a director to fill any vacancy unless, etc., and it is through this last section from which the sought for answer to the question comes, for a distinction is sufficiently clearly drawn between the expressions upon which to found a fair opinion that the filling of casual vacancies may be done by appointment without the use of the ballot.

Directors' By-laws.

A word on one matter in this connection, because although the statute is clear, the stringency of the enactment is not commonly appreciated. It is with respect to the confirmation of directors' by-laws (save any relating to the officers and employees) passed from time to time in the course of the year between annual meetings. Companies should be carefully advised as to the necessity for not allowing the annual meeting next succeeding the passing of the by-laws to take place without confirmation by the shareholders, as otherwise these by-laws become null (sec. 81) and it may be impossible to rectify the consequences of acts *ultra vires* by reason of the unnoticed termination of the by-laws absolutely essential to the validity of such acts.

Powers.

Apart from the phrase, in guarded language for constitutional considerations, "for any of the purposes or objects to which the legislative authority of the parliament of Canada extends" (sec. 5), the Companies Act does not specify what powers are to be conferred upon companies incorporated under it, except to the extent to which it may deal with real or immovable property or stock of other corporations, and as to its own financial and internal arrangements; and it is left for the draftsman of the clause in the application for the letters patent to specify what general powers are desired, as well of course as what particular class or classes of business are to be authorized. In practice very little restraint is placed upon corporations in this respect. But it is desirable to frame the description of the objects of the incorporation with care, first having regard to the kind of business the company intends to carry on, which should be described in as general terms as possible, and then in more particular terms those powers likely to be advantageous having regard to

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the principal powers. The Ontario Act has a most useful provision (sec. 23) by which it is enacted that the company shall possess as incidental and ancillary to the powers set out in the letters patent the powers in that section comprehensively set forth; failing express provision in the letters patent of a company incorporated under the Dominion Act doubts might well arise as to whether it would not be necessary for the company to obtain Supplementary Letters Patent to enable it to exercise many of the powers referred to, and it would be advisable in letters patent under the Dominion Act to insert these special provisions of the Ontario Act as to incidental and ancillary powers.

Unanimity of Legislation on the Subject.

These brief notes may be closed by the submission of an inquiry as to whether unanimity in the Companies Acts of the Dominion and Provinces would not considerably contribute to facility in the interchange of business between different parts of the Dominion. Certainly, as practitioners well know, it would very greatly contribute to the convenience of the profession. At present there are innumerable differences, some of which are important, and all tending somewhat to confusion, but there seems no good reason why the same Act should not do for the whole Dominion.

W. B. Raymond.

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CITIZENSHIP AND NATURALIZATION.

We are glad to reproduce here the following account of an address delivered by Mr. A. H. Clarke, K.C., M.P., at the fourth general meeting of the members of the Law Society of Alberta, held at Edmonton on January 4th and 5th, 1915. The address is of special interest by way of introduction to the recent Dominion Naturalization Act, 1914, which itself has a special interest as, we hope, the harbinger and forerunner of much concerted legislation between the various self-governing parts of the Empire for the benefit of the Empire as a whole.

Mr. Clarke commenced by stating that perhaps a more fitting title to his address would have been "Aliens and Naturalization." As an evidence of the value always pertaining to citizenship, Mr. Clarke quoted from Acts the words used by the centurion to the chief captain, "Take heed what thou doest for this man is a Roman." Webster's definition of a citizen was, "a person, native or naturalized, who has the privilege of voting for public officers and who is qualified to fill offices in the gift of the people, also any native born or naturalized person of either sex who is entitled to full protection in the exercise and enjoyment of the so-called private rights."

The privileges of aliens have varied in different countries and times. In some countries at certain times aliens had as many privileges as had the citizens. In the British Empire aliens have the same rights as citizens in regard to the ownership of real and personal property and have full rights to the use of the Courts to enforce their rights. There are two kinds of aliens; alien friends who are subjects of a State with which our country is at peace, and alien enemies who are the subjects of a State with which we are at war. An alien, whether friend or enemy, has not any absolute right to enter British territory and has no cause of action against any Canadian official who excludes him. This was discussed and decided by the Privy Council in the case of *Musgrove* v. *Chung Teeong Toy*.[1]

This rule is, however, much modified by conventions and treaties and as a matter of practice, alien friends are admitted freely, the principal exceptions being the exclusion

[1] [1891] A. C. 272.

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of immigrants of criminal or immoral character and idiots and those physically defective. Also aliens attempting to enter the country in contravention of the alien labour law. It is also a rule of law that an alien can be sent out of the realm by exercise of the Crown's prerogative, but in English practice a special Act is required. The principal cases where aliens are deported arise under the immigration, alien labour, and extradition laws. While resident in the British Empire an alien friend is entitled to full protection and owes temporary allegiance to the Crown. He cannot be admitted as a barrister, cannot vote at elections or hold any offices; he cannot act as a juryman, and cannot be the owner of a British ship, and under the Dominion Companies law the majority of the directors must be British subjects.

Private trading with an alien enemy is illegal without the King's license. A company incorporated in a country at war with Great Britain is an alien enemy, even if its members are British subjects.

The mortgagee of an alien ship captured in war has no rights even though he be neutral or a British subject. This question arose in the case of *The Marie Glaeser,* a German ship captured August 5th, 1914.[2] An alien enemy will not be allowed to sue in our Courts unless he has obtained a special license so to do from the Crown. He is in a similar position to an outlaw but is protected from being wantonly killed or outraged. Upon the resumption of peace his rights again become those of an alien friend. They are not extinguished by the war.

In the case of *The Hoop,*[3] Sir Wm. Scott thus states the law:—"No man can sue who is a subject of the enemy unless under particular circumstances that *pro hac vice* discharge hm from the character of an enemy, such as coming under a flag of truce, a cartel or pass, or some other act of public authority that puts him in the King's Peace *pro hac vice,* but otherwise he is totally *ex-lex.*"

And Sir Alexander Cockburn, L.C.J., in his work on Nationality (1869), at p. 150, says:—"An alien enemy has no civil rights in this country unless he is here under a safe conduct or license from the Crown. In modern times, however, on declaring war the Sovereign usually in the proclamation of war qualifies it by permitting the subjects of the

[2] [1914] P. D. 357.
[3] (1799) 1 C. Rob. 196.

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enemy resident here to continue so long as they peaceably demean themselves and without doubt such persons are to be deemed alien friends."

In a proclamation of the Governor-General of August 15th, 1914, it was provided that:—"All persons in Canada of German or Austro-Hungarian nationality so long as they quietly pursue their ordinary avocations are allowed to continue to enjoy the protection of the law and be accorded the respect and consideration due to peaceful and law-abiding citizens, and that they be not arrested, detained or interfered with, unless there is reasonable ground to believe that they are engaged in espionage, or engaging in or attempting to engage in, acts of a hostile nature, or are giving or attempting to give information to the enemy or unless they otherwise contravene any law, order-in-council or proclamation."

In Ontario Mr. Justice Hodgins in the case of *Bassi* v. *Sullivan*,[4] expressed a doubt as to whether this proclamation entitled an alien to sue and whether the protection granted was more than police protection. In British Columbia Gregory, J., in the case of *Topay* v. *Crow's Nest Pass Coal Co.*,[5] decided that by virtue of the above order-in-council the plaintiff (an alien enemy) could sustain an action for personal injuries sustained in following his avocation of coal miner.

In Manitoba Galt, J., in the case of *Pescovitch* v. *Western Canada Flour Mills Co.*,[6] followed the decision of Gregory, J.

In England *Princess Thurn & Taxis* v. *Moffatt*,[7] an alien enemy resident in England was permitted to sustain an action to restrain defendant from repetition of a libel.

The proclamation also provided for the interning of alien enemies who attempted to leave Canada, on there being reasonable grounds for believing that he intended to assist the enemy.

The War Measures Act (Canada) which was passed in August last provided that no person under arrest or suspicion as an alien enemy shall be released or allowed out on bail or tried without the consent of the Minister of Justice. After this proclamation an Austrian applied for a writ of *habeas corpus*, alleging that he only meant going into the United States for the purpose of farming. Mr. Justice Galt,

[4] (1914) 32 O. L. R. 14.
[5] (1914) 7 W. W. R. 223.
[6] (1914) 7 W. W. R. 454.
[7] [1914] W. N. 379.

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before whom the application came, held that the right of *habeas corpus* was only available to a subject and dismissed the application. *Re Chamryk*.[8]

Sec. 24 of the Naturalization Act (R. S. C. 1906, ch. 77), gives to naturalized aliens all rights and powers and makes them subject to all obligations to which a natural born British subject is entitled or subject within Canada, with this qualification, that he shall not when within the limits of a foreign State of which he was formerly a subject, be deemed to be a British subject, unless he has ceased to be a subject of that State in pursuance of the laws thereof, or in pursuance of a treaty to that effect.

Since the commencement of the war there has been a want of uniformity on the question of the right of an alien enemy to be naturalized, some judges granting it and others refusing. The matter was in the discretion of the judge before whom the case came. But by proclamation of October 28th, 1914, alien enemies are required to register before duly appointed officers, and it is provided that such aliens shall not be naturalized until a certificate of registration is produced and the registrar has approved of the naturalization. During the war, naturalization cannot be obtained except on these conditions.

Tracing back naturalization, Mr. Clarke said that they found it first among the Jews. In ancient Greece during the heroic ages the people had few or no privileges and strangers had the same. As different States settled down into organized communities the value of citizenship became enhanced and the privilege was more sparingly bestowed. After dealing with citizenship in Ancient Rome, Mr. Clarke came down to more modern days by stating that one of the acts of tyranny charged against George III. in the Declaration of Independence was that he had endeavoured to prevent the increase of the population of the United States by obstructing the laws for naturalization of foreigners and by refusing to pass others to encourage their immigration there.

Mr. Clarke then touched interestingly on the various countries which had passed naturalization laws at various times in the world's history and the periods of residence required in those countries, running from five years, with three years' notice of intention to apply for naturalization papers, down to those countries requiring no residential qualification which

[8] (1914) 7 W. W. R. 548.

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strangely enough were the countries now at war with the Allies.

In Austria 10 years' residence confers citizenship *per se*, while in China, foreigners are perpetually excluded except within certain prescribed limits, and except where provision is made by treaty for more extended privileges. In 1844 the first general Naturalization Act came into force in England; prior to that any person naturalized obtained a special Act of parliament or received denization papers issued by the Crown. The Act did not declare what the territorial effect of the law was to be.

In 1847 Parliament expressly declared that the Act of 1844 did not extend to British possessions, other than the United Kingdom, and that all past and future legislation of the different possessions for the conferring upon aliens of the rights and privileges of British subjects within the limits of those possessions, should be effectual, and this was the position at the time of the passing of the British North America Act, which gave the Dominion jurisdiction as to Naturalization and Aliens, since which time, according to the Hon. C. J. Doherty, Minister of Justice, no parliament in the Empire could constitutionally provide for a naturalization which would be effective throughout the Empire, the result being that a person naturalized in Canada could only be so recognized in Canada, and a person naturalized in New Zealand, or any other self-governing colony had no rights of a British subject outside of their respective countries.

This had led to several discussions and conferences. The question was dealt with at the Imperial Conferences of 1903, 1907, and 1911. Till 1870 in Great Britain a citizen could not renounce his allegiance, but this was repealed later and the right to expatriate was recognized. Under the former Naturalization Act a person naturalized in Canada ceased to be a British subject on returning to his native country and while remaining in that country. While in Canada he would be a British subject, but if he returned, say to Germany, he was a German subject and subject to military service.

In 1914 the Governments of the United Kingdom and the self-governing colonies, Canada, Australia, New Zealand, South Africa and Newfoundland agreed upon legislation which came into force on January 1st, 1915, whereby each country agreed to pass uniform naturalization laws, with the object of making naturalization in one possession effective

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throughout the British Empire. The principal changes brought about by this law in Canada (where it has been enacted by 4-5 Geo. V., ch. 44, assented to on June 12th, 1914), are the following: Under the present Act a person naturalized ceases to be a subject of the country where he formerly resided and has the full status of a British-born subject; the period of residence required througout the Empire is now five years, the former law only requiring three years. Under the old law the whole three years had to be spent in Canada, but under the new Act, one year's residence in Canada is required, the other four may be in any part of the British Empire.

An application for naturalization must now be given to the clerk of the Court three months previous to its being made and must also be posted up at the post office nearest to the residence of the applicant. Unless excused the latter must appear in person and produce the necessary evidence of his fitness to become a British subject; he must know the English or French language and, if approved by the Court, the application is forwarded to the Secretary of State, who may grant or refuse it at his discretion, from which there is no appeal. If granted, the Secretary of State forwards a certificate of naturalization to the clerk of the Court, to which application was made, who delivers it to the applicant upon his taking the oath of allegiance, thereupon the certificate takes effect.

Under the British Nationality and Status of Aliens Act, (Imp. Stats. 1914, ch. 17), and the new Canadian Act just referred to, a British-born subject is thus defined:—

1. Any person born within His Majesty's dominions and allegiance;

2. Any person born out of His Majesty's dominions whose father was a British subject at the time of that person's birth and either was born within His Majesty's allegiance or was a person to whom a certificate of naturalization had been granted; and

3. Any person born on board a British ship, whether in foreign territorial waters or not.

A person is also to be deemed to have been born within His Majesty's allegiance if born in a place where by treaty, usage, etc., or other lawful means, His Majesty exercises jurisdiction over British subjects.

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Mr. Clarke further, in the course of his address, touched on various points in the law, as to the granting of certificates to aliens, residence required, status of women married to aliens, aliens' children, certificate to minor aliens, the revocation of certificates where obtained by fraud. He stated that the wife of a British subject is to be deemed to be herself a British subject, and the wife of an alien an alien.

The former naturalization Act remains in force for 3 years, to the extent that during that period aliens resident in Canada on January 1st, 1915, may become naturalized under either Act, but if naturalized under the former Act obtain only the privileges given by it.

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TREATY BETWEEN THE UNITED KINGDOM AND THE UNITED STATES OF AMERICA WITH REGARD TO THE ESTABLISHMENT OF A PEACE COMMISSION.

SIGNED AT WASHINGTON, SEPTEMBER 15TH, 1914.

(Ratifications exchanged at Washington, November 10th, 1914.)

His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, and the President of the United States of America, being desirous to strengthen the bonds of amity that bind them together and also to advance the cause of general peace, have resolved to enter into a Treaty for that purpose, and to that end have appointed as their Plenipotentiaries:—

His Britannic Majesty: The Right Honourable Sir Cecil Arthur Spring-Rice, G.C.V.O., K.C.M.G., &c., His Ambassador Extraordinary and Plenipotentiary at Washington; and

The President of the United States: The Honourable William Jennings Bryan, Secretary of State of the United States;

Who, after having communicated to each other their respective full powers, found to be in proper form, have agreed upon and concluded the following articles:—

ARTICLE 1.

The High Contracting parties agree that all disputes between them, of every nature whatsoever, other than disputes the settlement of which is provided for and, in fact, achieved under existing agreements between the High Contracting Parties, shall, when diplomatic methods of adjustment have failed, be referred for investigation and report to a Permanent International Commission, to be constituted in the manner prescribed in the next succeeding Article; and they agree not to declare war or begin hostilities during such investigation and before the report is submitted.

ARTICLE 2.

The International Commission shall be composed of five members, to be appointed as follows:—

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One member shall be chosen from each country by the Government thereof; one member shall be chosen by each Government from some third country; the fifth member shall be chosen by common agreement between the two Governments it being understood that he shall not be a citizen of either country.

The expenses of the Commission shall be paid by the two Governments in equal proportions.

The International Commission shall be appointed within six months after the exchange of the ratifications of this Treaty, and vacancies shall be filled according to the manner of the original appointment.

ARTICLE 3.

In case the High Contracting Parties shall have failed to adjust a dispute by diplomatic methods, they shall at once refer it to the International Commission for investigation and report. The International Commission may, however, spontaneously, by unanimous agreement, offer its services to that effect, and in such case it shall notify both Governments and request their co-operation in the investigation.

In the event of its appearing to His Majesty's Government that the British interests affected by the dispute to be investigated are not mainly those of the United Kingdom, but are mainly those of some one or more of the self-governing Dominions, namely, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, and Newfoundland, His Majesty's Government shall be at liberty to substitute as the member chosen by them to serve on the International Commission for such investigation and report another person selected from the list of persons to be named, one for each of the self-governing Dominions, but only one shall act—namely, that one who represents the Dominion immediately interested.

The High Contracting Parties agree to furnish the Permanent International Commission with all the means and facilities required for its investigation and report.

The report of the International Commission shall be completed within one year after the date on which it shall declare its investigation to have begun, unless the High Contracting Parties shall limit or extend the time by mutual

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agreement. The report shall be prepared in triplicate; one copy shall be presented to each Government and the third retained by the Commission for its files.

The High Contracting Parties reserve the right to act independently on the subject-matter of the dispute after the report of the Commission shall have been submitted.

ARTICLE 4.

This Treaty shall not affect in any way the provisions of the Treaty of the 11th January, 1909, relating to questions arising between the United States and the Dominion of Canada.

ARTICLE 5.

The present Treaty shall be ratified by His Britannic Majesty and by the President of the United States of America, by and with the advice and consent of the Senate thereof, and the ratifications shall be exchanged at Washington as soon as possible. It shall take effect immediately after the exchange of ratifications, and shall continue in force for a period of five years, and it shall thereafter remain in force until twelve months after one of the High Contracting Parties have given notice to the other of an intention to terminate it.

In witness whereof the respective Plenipotentiaries have signed the present Treaty and have affixed thereunto their seals.

Done in duplicate at Washington on the fifteenth day of September, in the year of Our Lord nineteen hundred and fourteen.

(L.S.) CECIL SPRING-RICE
(L.S.) WILLIAM JENNINGS BRYAN.

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IMPERIAL ORDER IN COUNCIL.

Issued March 15th, 1915, stopping All Trade by Sea with Germany, Being a Retaliatory Measure on the Part of the Imperial Government to the Declaration by the Germans that the Waters Surrounding the United Kingdom are a Military Area.

"Whereas the German Government has issued certain orders which, in violation of the usages of war, purport to declare that the waters surrounding the United Kingdom are a military area.

"And whereas in the memorandum accompanying the said orders neutrals are warned against entrusting crews, passengers or goods to British or allied ships.

"And whereas, such attempts on the part of the enemy give to his Majesty an unquestionable right of retaliation.

"And whereas, his Majesty has therefore decided to adopt further measures in order to prevent commodities of any kind from reaching or leaving Germany, although such measures will be enforced without risk, to neutral ships or to neutral or non-combatant life and in strict observance of the dictates of humanity.

"And whereas the allies of his Majesty are associated with him in the steps now to be announced for restricting further the commerce of Germany, his Majesty is therefore pleased by and with the advice of his Privy Council to order, and it is hereby ordered, as follows:—

"First—No merchant vessel which sailed from her port of departure after March 1st, 1915, shall be allowed to proceed on her voyage to any German port. Unless this vessel receives a pass enabling her to proceed to some neutral or allied port to be named in the pass, the goods on board any such vessel must be discharged in a British port and placed in custody of the Marshal of the Prize Court. Goods so discharged, if not contraband of war, shall, if not requisitioned for the use of his Majesty, be restored by order of the Court and upon such terms as the Court may in the circumstances deem to be just to the person entitled thereto.

"Second—No merchant vessel which sailed from any German port after March 1st, 1915, shall be allowed to proceed on her voyage with any goods on board laden at such port. All goods laden at such port must be discharged in

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a British or allied port. Goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court, and if not requisitioned for the use of his Majesty shall be detained or sold under the direction of the Prize Court.

"The proceeds of the goods so sold shall be paid into the Court and dealt with in such a manner as the Court may in the circumstances deem to be just, provided that no proceeds of the sale of such goods shall be paid out of the Court until the conclusion of peace, except on the application of a proper officer of the Crown, unless it be shown that the goods had become neutral property before the issue of this order, and provided also that nothing herein shall prevent the release of neutral property laden at such enemy port on the application of the proper officer of the Crown.

"Third—Every merchant vessel which sailed from her port of departure after March 1st, 1915, on her way to a port other than a German port and carrying goods with an enemy destination or which are enemy property may be required to discharge such goods in a British or allied port. Any goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court and unless they are contraband of war shall, if not requisitioned for the use of his Majesty, be restored by an order of the Court upon such terms as the Court may deem to be just, and provided that this article shall not apply in any case falling within articles 2 or 4 of this order.

"Fourth—Every merchant vessel which sailed from a port other than a German port after March 1st, 1915, and having on board goods which are of enemy origin or are enemy property may be required to discharge such goods in a British or allied port. Goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court and if not requisitioned for the use of his Majesty shall be detained or sold under the direction of the Prize Court. The proceeds of the goods so sold shall be paid into the Court and be dealt with in such a manner as the Court may deem just, provided that no proceeds of the sale of such goods shall be paid out of the Court until the conclusion of peace except on the application of a proper officer of the Crown, unless it be shown that the goods had become neutral property before the issue of this order, and provided also that nothing herein shall prevent the release of neutral property

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of enemy origin on application of the proper officer of the Crown.

"Fifth—Any person claiming to be interested or to have any claim in respect of any goods not being contraband of war placed in the custody of the Marshal of the Prize Court under this order or in the proceeds of such goods may forthwith issue a writ in the Prize Court against the proper officer of the Crown and apply for an order that the goods should be restored to him, or that their proceeds should be paid to him, or for such other order as the circumstances of the case may require.

"The practice and procedure of the Prize Court shall, so far as applicable, be followed *mutatis mutandis* in any proceedings consequential upon this order.

"Sixth—A merchant vessel which has cleared for a neutral port from a British or allied port, or which has been allowed to pass as having an ostensible destination to a neutral port and proceeds to an enemy port shall, if captured on any subsequent voyage, be liable to condemnation.

"Seventh—Nothing in this order shall be deemed to affect the liability of any vessel or goods to capture or condemnation independently of this order.

"Eighth—Nothing in this order shall prevent the relaxation of the provisions of this order in respect of the merchant vessels of any country which declares that no commerce intended for or originating in Germany or belonging to German subjects shall enjoy the protection of its flag."

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CURRENT COMMENTARY UPON ENGLISH AND CANADIAN DECISIONS.

ENGLISH DECISIONS.

Farmers' Mart, Ltd. v. *Milne*,[1] is a decision of the House of Lords affirming the proposition that the test whether a claim connected with an illegal agreement can be enforced is whether the plaintiff requires any aid from the illegal agreement to establish his case. The agreement in question was one by which a trustee in bankruptcy had a private bargain with the plaintiff company, which was a creditor, that out of his fees as trustee, the company should be preferred in respect to its claim against the bankrupt estate. In other words the company was to eke out its dividends derivable from the estate by getting from the trustee a part of his remuneration. This was held by the House unanimously to be an illegal bargain. The creditor company was seeking in this action an accounting from the trustee of the fees received by him as such trustee, which it could only get through the aid of the illegal agreement, and therefore the action it was held, must fail. As Lord Dunedin says (p. 36):—"There are certain cases where an agreement is so divisible that it may be that the plaintiff can enforce his demand without having recourse to the illegal part of the agreement; but here they cannot do so, because the only reason why the company wants this accounting is in order that when the money is pooled they may be able to get twenty shillings in the pound, and that is set forth in these transactions."

Petley v. *Parsons*,[2] is a decision of the Court of Appeal affirming the proposition that a gate at the entrance to a private road, which is kept unlocked and open during business hours, is not necessarily an illegal obstruction to such private road; also that although one (the defendant) who has the right to pass and repass along the said private road, and who owns land adjoining it, may, while the road is unfenced, have the right of access on to it at any point of his land, yet the owner of the soil of the private road (the plaintiff, who was seeking to enjoin the defendant from interfering with her gate and fence) is entitled to put up a fence with a gate in it, along the side of the private road, inasmuch

[1] 84 L. J. P. C. 33, [1915] A. C. 106.
[2] 84 L. J. Ch. 81, [1914] 2 Ch. 653.

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as such fence would not interfere with the reasonable right of access to it. Cozens-Hardy, M.R., (p. 89), and the other two judges speak in a like manner, says:—"It must not be forgotten that the rights of interference with a right of way, obstructing a right of way, are by no means the same in the case of a public highway as in the case of a private road. In a public highway any obstruction is a wrong if it is appreciable. That, I think, is the recognised distinction. Any appreciable obstruction in a highway can be prevented by indictment or otherwise, but in the case of a private right of way the obstruction is not actionable unless it is substantial. It must be a real substantial interference with the enjoyment of the right of way. . . . It seems to me that this is a case in which the defendant was absolutely wrong in saying that no gate can be erected there which will involve a post on his side of the land, even though it be kept open during non-working hours when nobody can be inconvenienced by it. . . . The plaintiff has in terms offered to put a small gate in the fence which she proposes to put up. That seems to me to be giving the defendant on this part of the case all—I am not sure that it is not more than the defendant is entitled to."

The case is also interesting as shewing the sympathy and encouragement which Courts in England give to those who seek to defend their rights, even when the particular matters complained of may seem trivial. This is that characteristic of Englishmen which the great jurist Ihering, in his 'Struggle for Law'—so highly commends. The judge below Sargant, J., had said (p. 83):—"Though fully two days of the Court have been occupied by the hearing of this action, I must say that so far as the plaintiff is concerned it seems to me a trumpery, a trivial, and perhaps I might say a petty action. The plaintiff is seeking to enforce alleged rights which are plainly of no value to her, but whose enforcement would cause great embarrassment to and inflict considerable loss upon the defendant;" and after considering the strict legal rights in the matter, he ended by dismissing the action with costs. On appeal his judgment was reversed, all three judges stating their reasons at length, and (at p. 90) Swinfen Eady says:—"The learned judge said that so far as the plaintiffs were concerned it seemed to be a trumpery, trivial, and perhaps he might say a petty action. I cannot take that view The parties are in dispute as to their legal rights.

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One side takes one view and the other side takes the other view of what their legal rights are, and they come to the Court to have those rights determined."

Directors of companies have duties to discharge of a fiduciary nature towards their principal; and it is a rule of universal application that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict with the interests of those whom he is bound to protect: and (so strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. This is so both under the law of Scotland, and under the law of England, the principle in both cases, coming from the Roman law. In *Transvaal Lands Co.* v. *New Belgium Land Co.*[8] this principle was applied to a case where a director of a company voted for—and so supplied the necessary quorum—to carry a resolution that his company should purchase a number of shares in a Gold Exploration Company, from a company which owned them, in which last company he himself had shares. The shares which this director had in the vendor company he held only as trustee for other parties. It was held that this made no difference—and on this point the case appears to be one of first impression; and as the vendor company had notice of the irregularity, the purchase of the shares, which had been carried out, was set aside. Swinfén Eady, L.J., citing the above governing principle, says (p. 100):—"Where a director of a company has an interest as shareholder in another company, or is in a fiduciary position towards and owes a duty to another company, which is proposing to enter into engagements with the company of which he is director, he is in my opinion within this rule. He has a personal interest within this rule, or owes a duty which conflicts with his duty to the company of which he is director. It is immaterial whether this conflicting interest belongs to him beneficially or as trustee for others. He is bound to do as well for his *cestuis que trust* as he would do for himself. Again the validity or invalidity of a transaction cannot depend upon the extent of the adverse interest of the fiduciary agent, any more than upon how far in any particular case the terms of a contract have been the best obtainable for the interest of the *cestui que trust*, upon which subject no enquiry is permitted."

[8] 84 L. J. Ch. 94, [1914] 2 Ch. 488.

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In re Farnol, Eades, Irvine and Co.,[4] calls for a word of notice as it points a distinction which will exist between the English Courts (Emergency Powers) Act 1914, and our Moratorium Act, if the Bill for the latter passes in its present form. The English Act provides that 'from and after the passing of this Act no person shall . . . foreclose . . . except after such application to such Court and such notice as may be provided for by rules or directions under this Act,' and what Warrington, J., decides in the above case is that this provision does not apply to *the commencement* of a foreclosure action or a debenture holder's action; nor does it preclude the Court from appointing a receiver and manager if no such application has been made. The Moratorium Bill now before our Legislative Assembly, the provisions of which we gave in our last issue, proposes to enact that 'no person shall *take* or continue proceedings by way of foreclosure . . . except by leave of a judge granted, upon application as hereinafter provided.'

In re Monolithic Building Co., Tacon v. *The Company*,[5] is a very important decision by Astbury, J., upon sec. 93 of the English Companies (Consolidation) Act 1908, which is also contained in the British Columbia Companies Act, sec. 102 (1), and the Yukon Companies Ordinance 1914, ch. 15, sec. 102 (1), and which provides that a mortgage or charge on any land of the company 'shall so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company unless the prescribed particulars of the mortgage, together with the instrument, are delivered to the register within 21 days for registration.' Astbury, J., held that this does not exclude the equitable doctrine of notice; and that a mortgage although not registered took priority over a subsequent registered mortgage debenture the holder of which had notice of the former mortgage at the date of his advance. He says, at p. 140: "I am told that there is no decision upon this point under sec. 93, and the sections in previous Acts to the same effect which had preceded it. . . . It has been contended that of late years statutes providing for avoidance of documents in default of registration have been strictly construed, and reference has been made to the Bills of Sale Acts. Now, it is to be observed that in the Bills of Sale Acts avoidance of the documents in question is not only

[4] 84 L. J. Ch. 129, [1914] 1 Ch. 22.
[5] 84 L. J. (Ch.) 134.

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provided for in default of registration, but in default of them complying with certain prescribed forms and other requirements. A document amounting to a bill of sale which is not in the prescribed form apparently passes nothing whether registered or not, and it is not necessary, I think, for me to decide, or attempt to decide, anything as to the effect of non-registration of a bill of sale upon such an issue as has arisen in the present case. It is no doubt extremely desirable that Acts of Parliament should be construed literally to mean what they say. It is also, in my judgment, equally desirable that people should not be entitled to deprive others of securities which were given to them for value, with full notice of which they took their own security, relying upon technical objections."

Herbert Morris, Ltd. v. *Saxelby,*[6] is a definite decision by Sargant, J., upon a point suggested by the judgments of Lord Shaw, and Phillimore, L.J., in *Eastes* v. *Russ,*[7] namely, that a covenant in restraint of trade may be illegitimate as between employer and employee, quite apart from the extent of the prohibited area, or from the duration of the prohibition, if it seeks to restrain the employee, after the termination of his employment from using in competition with the employer the experience and skill which he has acquired during his employment. Sargant, J., holds that in dealing with the defence of undue restraint of trade, it is necessary not only to determine whether the restrain is reasonably necessary for the protection of the master in his business, but to take into account, also, the oppressiveness of the restriction on the servant, particularly from the point of view of the damage done to the public interest by his energies being unduly fettered. He was not prepared to say that the agreement in question was unreasonable as regards either space or time, in the sense that it might not be some advantage to the plaintiffs to prevent the defendant from engaging to the full extent of the space and time prescribed in work of the kind prohibited—namely, the sale or manufacture of pulley blocks, hand overhead runways, electric overhead runways, and overhead travelling cranes, of which three-fourths of their business consisted. He said that as between a vendor and a purchaser he would have felt compelled to give effect to the contract; but that here the plaintiffs were claiming to prevent

[6] 84 L. J. Ch. 149.
[7] 83 L. J. Ch. 329, [1914] 1 Ch. 468.

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the defendant from using in competition with them the experience and skill which he had acquired, and the claim was, in his judgment an illegitimate one, and none the less so because the defendant's skill and experience had been entirely derived from his employment with the plaintiffs and their predecessors in business. The case was not one in which there appeared to be anything in the nature of trade secrets; but the plaintiffs by the covenant in question were seeking to guard against the competition which might arise from the "subjective" knowledge of the defendant, i.e., the knowledge which formed part of the general mental equipment of the defendant, and properly belonged to him; and this the plaintiffs could not legally do.

In *In re Birkbeck Permanent Benefit Building Society*,[8] the short point decided by Nevelle, J., was that when a liquidator in a winding-up has overpaid certain persons entitled to share in the distribution of the assets, the Court is entitled to order the money to be paid back to the liquidator.

The question decided by *Howell* v. *Dering et al.*,[9] may, perhaps, without undue frivolity be put in the form—'When is an issue, not an issue?' The action was brought for damages occasioned to the plaintiff by the alleged fraud of the defendants, whereby the plaintiff was induced to take shares in a company, and for compensation for loss sustained by the plaintiff by reason of untrue statements in the prospectus of the company on the faith of which the plaintiff subscribed for the shares. The jury in answer to questions found that the defendants did not authorise the issue of the prospectus, and that they believed the prospectus to be true, and had reasonable grounds for that belief. The trial judge accordingly gave judgment for the defendants with costs. But two other questions had been submitted to the jury, namely, whether the prospectus contained untrue statements of material facts or omissions of fact; and whether the plaintiff took his shares relying on the truth of the prospectus: and the jury answered both these questions in the affirmative. The trial judge made no special order as to the costs of these two latter issues, if issues they should be called. Now English Order lxv, r. 1, [being in effect our Cons. R. 74 (3)] provides 'that where any action, cause, matter, or *issue* is tried with a jury, the costs shall follow the *event*, unless the judge by whom such action, cause, matter,

[8] 84 L. J. Ch. 189, [1915] 1 Ch. 91.
[9] 84 L. J. K. B. 198, [1915] 1 K. B. 54.

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or issue is tried, or the Court, shall, for good cause, otherwise order.' The question was—were the above last two questions 'issues,' and were the answers of the jury to them 'events' within the meaning of the above Rule, because if so the plaintiff would be entitled, it was contended, to the costs of them; and the judgment as drawn up so directed. The Court of Appeal, however, decided that this was wrong, and that the plaintiff was not entitled to the costs of either of these questions against the defendants, because they were not 'issues,' nor the answers to them 'events' within the meaning of the Rule. Buckley, L.J. (p. 203), says: "It appears to me . . . that it is impossible to maintain that every question of fact that is in dispute between a plaintiff and a defendant is an issue. The word is no doubt used in more than one sense. Every question of fact may be said to be in issue in the sense that it is in dispute. Every question of fact which is left to the jury does not, however, by reason of that become an issue within the rule. For my fact. I should define an "issue" for the purposes of this rule in some such terms as these: An issue is that which, if decided in favour of the plaintiff, would in itself give a right to relief, or but for some other consideration would in itself give a right to relief, or which, if decided in favour of the defendant would in itself be a defence. . . . An 'event,' I think, is an outcome of the presentation to the tribunal of some claim made by the plaintiff against the defendant which results in a finding that the plaintiff is or is not entitled to some relief against the defendant. . . . An issue is not an incidental question: it is one which results in a determination or an adjudication in favour of either one party or the other." Tested in this way he held that the last two questions above mentioned were not "issues" nor the answers of the jury to them "events" within the meaning of the Rule. Kennedy, L.J. (p. 205), says: "I agree that generally there would seem to be this limitation—that an issue must be some matter of contention between the parties, the determination of which by the tribunal is, or but for some other consideration, would be, decisive of the case." He hesitates, however, to dogmatically assert that this must be so in all cases, in view of *Wagstaffe* v. *Bentley*,[10] but he agrees with the result arrived at by Buckley, L.J., because the questions and answers were only links, or stages in the proof important either to the plaintiff or defendant. He says (p.

[10] 71 L. J. K. B. 55, [1902] 1 K. B. 124.

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206-7): "It seems to me that to speak of either of these questions as an "issue" within the meaning of the Rule is to give to the word as there used a far wider meaning than can justly be applied to it. Where the plaintiff gives a long history of the facts which he deems to be material to his case and the defendant denies all these statements, a large number of questions of fact thus arise; and if the tribunal finds several of these questions in favour of the plainitiff which nevertheless do not create a liability on the defendant it seems to me that it is impossible to say that those are issues within the meaning of the rule. . . . An issue . . . must be a question, as it seems to me, so distinct, definite, and separate in itself that the decision of it can properly be described as an "event" within the rule. It may be said that that is only getting out of one obscurity into another—a remark which I appreciate. I think "event" merely means result; but it must be such a material result as constitutes an important and definite conclusion of fact, and not merely a link in the chain which, when proved by the plaintiff is, by itself and without assistance, of no value to him as creating the liability which he seeks to force upon the defendant." Phillimore, L.J., (at p. 209), says: "In my view, the right definition of an issue is that which, if found in favour of the plaintiff, will, unless there is some other issue interfering with it, give him his verdict or his judgment. That being so it seems to me that in this case there was but one issue to be determined: Aye or no, had the plaintiff made out a case for the recovery of damages for deceit from these particular defendants? That was the issue which had to be tried. It might have been broken up into any number of questions, and it entailed the examination of several different allegations of fact, but it remained one issue, and therefore the costs ought to go to the defendants, who succeeded upon that one issue."

Roper v. *Works and Public Buildings Commissioners*,[11] brings up a point interesting in regard to that part of English Constitutional law which is also ours. The question was whether an action would lie against His Majesty's Commissioners of Public Works and Building (a) for breach of contract (b) for damages in respect of wrongful acts independent of contract committed by their agents or servants. As to (a) Shearman, J., considered himself bound by *Graham*

[11] 84 L. J. K. B. 219, [1915] 1 K. B. 44.

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v. *Works and Public Buildings Commissioners*,[12] to hold that an action for breach of contract would lie against the defendants, although he held that they were servants of the Crown and not merely a statutory body invested with public rights and liabilities like the trustees of the Mersey Docks. As to (b) he held, on the authority of cases cited, that no action would lie, on the principle that the heads of Government departments are not responsible for the wrongful acts of their subordinates, and the existence or absence of incorporation makes no difference. "All the authorities tend to shew that servants of the Crown are not liable to be sued in their official capacity for torts."

In *Wheeler* v. *Morris*,[13] the defendant had a sun blind outside his shop. A man jumped off the pavement and maliciously pulled the iron rod or arm of the blind, by which it was extended over the pavement, down upon the plaintiff and injured him. There was evidence that similar accidents had happened to similar blinds in consequence of persons jumping up in the same way and catching hold of them. It was held by Avory and Rowlatt, JJ., that the defendant was liable upon the principle thus expressed by Vaughan Williams, L.J., in *McDowall* v. *Great Western R. W.*[14] "In every case in which the circumstances are such that any one of common sense having the custody of or control over a particular thing would recognise the danger of that happening which would be likely to injure others, it is the duty of the person having such custody or control to take reasonable care to avoid such injury." As Avory, J., said, the only question was whether every person who has such sun blinds ought to contemplate such accidents happening by reason of persons jumping up and catching hold of them; and the Court held that such person should do so.

A. H. F. L.

CANADIAN DECISIONS.

By failure to serve notice of assignment, and neglect to sue in the name of the assignor, the plaintiffs in *Union Assurance Co. and Sisters of St. Ann* v. *B. C. Electric Ry. Co.*,[15] lost their action. Through the alleged negligence of the defendant company a fire was caused which damaged the

[12] 70 L. J. K. B. 860, [1901] 2 K. B. 781.
[13] 84 L. J. 269.
[14] 72 L. J. K. B. at p. 656.
[15] (1915) 30 W. L. R. 717.

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property of the Sisters of St. Ann who held a policy of insurance thereon. The insurance company made good the loss sustained by the Sisters who assigned them their rights against the defendant company. As notice of the assignment was not given the defendants the assignment was an equitable one, and the assignee could only sue in the name of the assignor. Action was however commenced within six months of the fire in the name of the insurance company as plaintiffs. Subsequently, but more than six months after the date of the fire, the Sisters of St. Ann were added as co-plaintiffs, but without prejudice to the defendants' right to take advantage of the limitation clause in its special Act. It was held by the Court of Appeal of British Columbia that as the plaintiff company could not support the action in its own name, and as the action of the Sisters of St. Ann was barred by the Act the decision appealed from must be reversed and judgment entered for the defendants with costs.

Re Christenson,[16] is a decision by Harvey, C.J., of Alberta in Chambers. A will contained the following clauses: 'First, I give and direct that my executors hereinafter named pay all my just debts and funeral expenses as soon after my decease as conveniently may be; secondly, after the payment of such funeral expenses and debts, I give, devise and bequeath . . . *to Jens Buhl of Lindsay Platte Co., Nebraska;* lastly, I make, constitute and appoint *Jens Buhl of Lindsay Platte Co., Neb.*, to be *executor* of this my last Will and Testament, hereby revoking all former wills by me made.' The will was on a printed form, the blank spaces thereon being filled in by a non-professional person with the above italicized words:—Held, that the words "after payment of such funeral expenses and debts" formed an elliptical expression leaving something understood; that the words "what is left of my property" being clearly omitted, must be read into the will after the word "bequeath," there being a presumption that a testator intends to dispose of his entire estate and not to die intestate as to the whole or any part thereof. *Perkins* v. *Fladgate*,[17] referred to. Held, *debutante* (*sic*) that the executor took the whole beneficial estate under the Wills Act (1 Wm. IV. ch. 40), since that intention was clear from the terms of the will; that the said principle applied to real as well as to personal property owing to the

[16] (1915) 30 W. L. R. 703.
[17] (1872) L. R. 14 Eq. 54, 41 L. J. Ch. 681.

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fact that real property now goes to the executor and is to be disposed of by him as personalty.

The February issue of THE CANADIAN LAW TIMES contained an article discussing the effect of the addition to the reddendum of a lease made in pursuance of the Short Forms Act of the words "without any deduction, defalcation or abatement whatsoever." A dictum on this point is to be found in the case of *Tyrrell* v. *Verral*.[17a] Meredith, C.J.O., in delivering the judgment of the First Appellate Division of the Supreme Court of Ontario, March 15th, 1915, said, "In the view I take it is not necessary to decide that question, but as at present advised I am not prepared to assent to the argument, especially as the lease contains an express covenant by the Lessee to pay the water rates, gas and electric light rates, which would seem to exclude liability to pay any other rates." This as broadly stated is doubtless correct; for a general agreement to pay without any deduction could not be held to refer to taxes where other provision is specifically made for their payment. See *Rawlins* v. *Biggs*.[18] We respectfully submit that it is doubtful whether a covenant to pay water rates, gas and electric light rates, even where there is a municipal plant supplying water, gas and electric light, is a covenant to pay taxes. The word "rates" has a double meaning. Sometimes it is a synonym for taxes, in other cases, as in this, it appears to mean the price paid for a commodity. The English decisions on this point are conflicting, and not in a satisfactory condition, but there is a decision, *Attorney-General of Canada* v. *City of Toronto*,[19] a case much litigated in Ontario, finally decided in the Supreme Court of Canada, which though decided on other grounds, contains clear statements of opinion in all the Courts on this point, holding that water rates were not taxes but were the price paid for a commodity. It might be said that a covenant to pay water rates, gas and electric light rates refers to that part of the taxes of a municipality imposed to meet erection or maintenance expenses for the water or gas plant, such as sinking fund charges: and that therefore such a covenant is a covenant to pay taxes. The proposition is, however, but faintly arguable. When the phrase "water rates" is used few people mean that portion of the taxes imposed for sink-

[17a] 8 O. W. N. 114.
[18] (1877) 3 C. P. D. 368.
[19] (1893) 23 S. C. R. 514.

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ing fund purposes. The presumption is that the charge for the use of the water is what is in mind.

The case last mentioned contains an important expression of opinion on the meaning of s. 97 of the Ontario Assessment Act, (R. S. O. 1914, c. 195). "Any tenant may deduct from his rent any taxes paid by him which, as between him and his landlord, the latter ought to pay." The clause was different in the Revised Statutes of 1897 (R. S. O. 1897, c. 224, s. 216). See *Meeham* v. *Peers*;[21] *Fitzgerald* v. *Mandas*;[22] *Rochfort* v. *Brown*.[23] In the case in question Messrs. M. & V. leased from the plaintiff T. certain grounds. The arrangements were made by M.; and included an agreement to pay taxes. By an oversight no covenant to this effect appeared in the lease. M. admitted his liability to pay; but V. to whom the Lease had been taken for signature by M. said he was never told of this agreement; and had never consented to it. Taxes were for two years paid by M. then M. left and V. sub-leased to J. & W. who paid the taxes. V. sought to deduct them from the rent and T. sued. In giving judgment the learned Chief Justice said,—

> "Accepting as true the testimony of the appellant "that when he executed the Lease he did not know of the "arrangement that Matthews had made as to the pay- "ment of the taxes, and believed that the lease contained "all the terms that had been agreed upon, the only pos- "sible inference to be drawn from the facts I have men- "tioned, is, I think, that the appellant subsequently "learned of the arrangement as to the taxes and recog- "nized that the Lessees were bound to pay them, or at "all events, that Matthews was under that obligation; "and when the Appellant took over the school, and, as "Matthews testified, released him, the appellant became "bound as between himself and Matthews to pay the "taxes; and probably as between himself and the respond- "ent, came under that obligation. If it be the proper "conclusion that as between the appellant and Matthews "the appellant became liable to pay the taxes, and of "course if the result of the transactions was that the Ap- "pellant came under that obligation to the respondent, the "Appellant is not entitled to deduct the taxes from the "rent. The statutory right of a tenant to deduct the taxes "paid by him from his rent exists only where as between "the landlord and the tenant the landlord ought to pay

[21] (1899) 30 O. R. 433.
[22] (1910) 21 O. L. R. 312.
[23] (1912) 25 O. L. R. 206.

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"them, and in the circumstances of this case it cannot be "said that as between his tenants and the respondent the "latter ought to have paid the taxes. If the circum- "stances I have mentioned were absent, and the "questions were to be determined on the terms of "the lease and the evidence as to the omission of a "provision that the tenant should pay the taxes, I am of "opinion that the appellant would fail. Matthews and "he were the tenants under the lease, not the appellant "alone, and where there are more tenants than one it is "in my opinion sufficient to exclude the operation of the "statute that as between one of them and the landlord "that one ought to pay the taxes; in other words, that in "such a case, applying the Interpretation Act, the sec- "tion which gives the right to deduct the taxes applies "only where none of the tenants is liable, but the land- "lord is liable to pay the taxes. A further difficulty in "the way of the appellants' success is the fact that he "did not pay the taxes of 1913, but they were, as I "have said, paid by Jones and Ward."

In *Kennedy* v. *Suydam*,[24] an attempt was made by counsel for the defendant to divide his client's memory into three water-tight compartments. On the return of the appointment for examination for discovery counsel for the defendant took the objection that before the witness could be sworn counsel for the plaintiff must decide in what capacity the plaintiff wished first to examine the defendant, whether as an individual defendant, or as an officer of one of the two defendant companies, and if so of which company, demanding that there be three separate examinations. The examiner ruled that Suydam should be examined in the three capacities at once, making a single examination. Upon counsel for the defendant refusing to allow him to be sworn the matter came before Middleton, J., on a motion to attach. The learned judge disposed of the matter very shortly, holding that the defendant must tell all the facts in his personal knowledge, and that without regard to the capacity in which those facts came to his personal knowledge.

In *Rural Municipality of McLean* v. *Southern Alberta*,[25] we have yet another judgment of a Court of first instance on a subject which will some day furnish a great case, and more than one. It was held on the facts and statutes then before the Court that the interests of the defendants in Dominion

[24] (1915) 8 O. W. N. 60.
[25] (1915) 30 W. L. R. 540.

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Crown lands could be taxed though that interest was no more than that of a lessee; and that the fact that ownership when acquired would be subject to certain conditions imposed by the Irrigation Act did not affect the issue. "It is also perfectly clear by the terms of the Rural Municipalities Act that it is the intention to tax such interests, and the defendant comes clearly within the definition of "Occupant" in the Act. I see no grounds therefore upon which it can escape liability and there will be judgment for the plaintiff for the amount claimed with costs."

We give herewith three decisions of the Supreme Court of Canada not published elsewhere.

Morgan v. *Dominion Permanent Loan Co.* was a case of a signature procured by fraud. M., intending to apply for shares in the respondent loan company, pursuant to the proposal of one L. the agent of the company for obtaining such applications, was induced through the fraud of L. to sign, without reading it, a document which she believed to be an application for shares but which, in fact, was a mortgage for securing a supposed loan to her. The mortgage contained a covenant to repay the amount of the loan. M. was an intelligent woman capable of reading and understanding the document. It was held, (30 Nov. 1914), reversing the judgment appealed from, (17 B. C. R. 366), the Chief Justice and Davies, J., dissenting, that as M. was under no duty to exercise care to protect the company against the possible frauds of their agent, L., she was not guilty of negligence estopping her from setting up the plea of *non est factum* which, in the circumstances, was a good defence.

Pringle v. *Anderson* came by way of appeal from Quebec. At a time when St. Matthews Presbyterian Church in Montreal, was heavily encumbered with debt incurred in building the church, a committee was formed to collect contributions to be applied in liquidating the debt by means of a "building fund," and the testatrix made her will by which she bequeathed certain real property to that committee. The committee were relieved of their duty and the fund ceased to exist several years later. During the year previous to the death of the testatrix the original debt in respect of which the building fund had been established was fully paid. There remained, however, at the time of her death balances of debt still due for expenses incurred for other building purposes.

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In an action to have the bequest declared to have lapsed on account of failure in its ulterior disposition,—It was held by Fitzpatrick, C.J., Idington and Brodeur, JJ. (Dec. 29th, 1914), affirming the judgment appealed from, (Q. R. 46 S. C. 97), that, in the circumstances of the case, the bequest must be construed as a bounty to the trustees of the church for the purposes of building expenses, including debts incurred for such purposes subsequent to the construction of the church; that the motive of the testatrix was not to make a contribution to any particular fund but to benefit the congregation in respect to its building liabilities generally, and that the legacy did not lapse in consequence of the "building fund" having ceased to exist and the extinction of the debt in regard to which contributions to that fund were to be applied. *Per* Duff and Anglin, JJ., dissenting.—It was of the essence of the gift that it should be capable, at the time of the death of the testatrix, of being applied in furtherance of the specific purpose for which the "building fund" had been instituted and, in consequence of the failure of that ulterior disposition, it lapsed under the provisions of article 964 of the Civil Code.

In *Halparin* v. *Bulling* we have an example of a well established principle. In that case B. was owner of an automobile and hired a chauffeur to run it giving him positive instructions that the car was not to be used except for purposes of the owner and his family, and that, when not in use for such purposes, it was to be kept in a certain garage. On the evening of the accident in question the chauffeur took his master's family to a theatre, in Winnipeg, and was directed by them to take the car to the garage and return for them after the close of the performance. The chauffeur took the car from the garage before the appointed time and proceeded with it for the purpose of visiting a friend in a distant part of the city. While so using the car, contrary to instructions, he negligently ran down the plaintiff causing injuries for which an action was brought to recover damages against B. Held, affirming the judgment appealed from (24 Man. R. 235), that, at the time of the accident, the chauffeur was not engaged in the performance of any act appertaining to the course of his employment as the servant of the owner of the car and, consequently, his master was not liable in damages. *Storey* v. *Ashton*,[26] followed.

L. D.

[26] (L. R. 4 Q. B. 476.)

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CONTEMPORARY LEGAL REVIEWS AND PERIODICALS.

The Juridical Review, which is certainly honourably distinguished from all other legal publications within our knowledge, by the handsome style in which it is published, the delightfully thick paper and clear type—has a long article by Mr. J. W. Brodie-Innes upon '*Some Outstanding Differences between English and Scots law in respect to the land systems.*' The points which he makes are: (1) that when the feudal system was introduced into Scotland it was of the original French type, in which the true feudal principle prevailed that each man took the oath of fealty to his own immediate lord only, and that lord to his superior, and so eventually the chief lords swore fealty to the King. Consequently if any intermediate lord chose to rebel and break his fealty, all his vassals were bound to follow him. But in England, William the Conqueror made every man in the Kingdom take an oath of personal fealty to himself, and by this apparently simple change made himself absolute monarch, and the Great Barons were no longer petty Kings each on his own domain. Hence some writers have said that the Scottish feudality was the true system, and that England never was really feudal from the beginning: (2) that, perhaps because the Scottish type of feudalism was considerably nearer to the old Norman type than that introduced into England by the Conqueror, and was more akin to the primitive system on which it was grafted, the feudal forms have survived to the present time, though gradual developments have pared away the complex ceremonial and the inordinate expense of the old feudal conveyancing, while in England the whole system of land transfer by feudal formulas was practically swept to limbo by the introduction of Uses; (3) that in Scotland there was no separate Court of Equity, nor was there ever a law of mortmain, and Uses in the English sense never arose; (4) that since writing became the ordinary means of transferring land, the almost universal custom in England has been to hand over the charter or deed to the new owner of the land, whereas in Scotland, perhaps on account of the more disturbed state of the Kingdom in early days, it was the custom to place these records in some place of safe keeping, often

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in the hands of the Church. But in 1617 a General Register was established in Edinburgh and Particular Registers throughout the country, in which all deeds relating to land must be registered. So it has come about that the title deeds which are of such supreme importance in England, signify little in Scotland, for an extract (or office copy) of a deed can always be obtained on payment of a fee, and the danger which besets the English landowner of losing a title deed has no weight in Scotland.

In the same number of the Juridical Review, Mr. W. W. Lucas contributes a very long Article upon *The Crown and Private Rights.* He shews how jealously custom and statute laws guard the property and other rights of individuals, and then proceeds to discuss the general limits that the law places upon the action of the Crown in favour of private rights. Officers and servants of the Crown may not violate the personal liberty or other right of the subject, neither can they plead the direct order of the King. In the body of the Article, the writer discusses authorities which show in some detail how the discretionary powers of the Crown are bounded by the claims of the individual, and afterwards reviews a number of cases which set in a fuller light the claims of the Crown. Much research is displayed, but the writer leaves a good deal to be desired, in regard to lucidity, and arrangement. We will make two short extracts as samples of the matter of his Article, one because of its bearing on the present condition of things in England, the other because it states a curious point of which we must confess our entire ignorance. The first is as follows: 'The right of a subject to his liberty is evidenced by the fact that the Crown might not take either a person or his property by way of impressment without making payment or compensations. The overriding necessity for defence of the country and of the country's interests, although it gave to the Crown the power to claim the use of service and property, did not extinguish these proprietary privileges of citizenship, but rather caused a value to be placed upon them.'

The second is the following: 'The Crown is not bound by the Statute of Frauds, 29 Car. II. c. 3, which provides rules for evidencing the transactions of subjects, and which are presumed to be unnecessary in respect of transactions by the Crown.'

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After a well-written account of the Eaglesham poisoning case—a Scotch criminal *cause celebre* of the year 1857, this number of the Juridical Review ends with an Article under the weird title '*Busones*,' a word which we are not surprised to read, has puzzled many generations of antiquaries and philologists, as well in regard to its meaning as in regard to its derivation. It appears that Bracton states that on certain occasions, the Justices are to summon *quatuor vel sex vel pluribus de majoribus de comitatu, qui dicuntur busones comitatus*. The word 'busones' also, it appears, occurs in a similar connection in the Gloucester Roll of 1211-12. Most critics have thought that this is a mere mistake for 'barones,' but this won't do for Mr. Arthur Belts who writes the Article, nor for several other learned men whose opinions are given. One theory connects the word with 'besoin,' indicating 'men of affairs,' and so the active doomsmen of the shire moot. Our author finds an Icelandic derivation for the word; and concludes that these *busones* were a superior class of doomsmen, with a special power and duty to arrest evil doers in their neighbourhood. They and not the smaller fry would be arrested for false judgments. The Article shews much curious learning, but rather suggests the order of mind, a good deal in evidence of late, which delights to worry over any puzzling antiquarian problem, as a dog worries a bone, without much regard to whether there is any meat on it or not. When Bracton used the word 'busones,'—if he ever did—he meant the chief men of the County. He has told us so himself. Why these were called 'busones'—if they ever were—seems a point more curious than important.

The Michigan Law Review for March has an Article, or rather an Address, interesting not only on account of its contents, but because of its authorship, comprising certain *Observations on the Law of Evidence*. It is by Mr. E. R. Thayer, the son of the author of the Treatise on Evidence, in connection with which the writer tells a good story of Mr. Choate saying to him *a propos* of the Treatise—"Tell your father it is a good book, but it is a pity he did not publish it while there was still such a thing in existence as the law of evidence." Mr. Thayer directs his attention mainly to the rule as to hearsay evidence. The line of thought advanced as to this is indicated by the following short extract: "We have long since ceased to deny ourselves the advantages of interested testimony merely because it has danger; as Lord Cock-

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burn somewhere says, nowadays we let the evidence in and then discuss its value. Should we not adopt a like method in a treatment of hearsay provided the witness cannot be brought into Court? I should answer 'yes' to this question; but that answer cannot be made without looking the fact squarely in the face that the departure from fixed rules of exclusion means trusting much to the trial judge's discretion.'

Mr. Thayer also well says: 'A distinction between written and oral testimony may well deserve more attention from modern reformers of the law of evidence than it received at common law. In dealing with hearsay the suspicion of the common law as to the unreliability of hearsay statements actually made seems at times out of all proportion to its willingness to accept the testimony of the witness who testifies that they *were* made. It attributes such an importance to cross-examination that it is ready to assume the trustworthiness of the witness to the fact of the declaration simply because he can be cross-examined, and the untrustworthiness of the declarant simply because he cannot. In real life, however, the ease of manufacturing declarations and putting them into the mouth of the dead is one of the most serious elements in the problem. This element largely disappears in the case of written declarations; for the danger of forgery is relatively slight as composed with that of mistake or dishonesty concerning oral communications. The operation of our present rule to keep out statements in old letters or depositions of persons now dead in suits between third parties is indefensible.'

Other Articles in this number of the Michigan Law Review are upon '*The International Status of the Grand Duchy of Luxemburg and the Kingdom of Belgium in relation to the present European War,' by Theodore P. Ion,* and '*Some needed reforms in the Methods of Selecting Juries*' by Willis B. Perkins. He himself very conveniently summarises the suggestions which he makes as follows:—

1. The securing of the jury should be under the guidance and control of the trial judge, and his judgment and rulings should be final and conclusive, except in case of a clear abuse of discretion affecting the merits of the controversy.

2. The examination of a proposed juror should be confined to the essential questions relating to his qualifications, namely, as to whether he is related to either of the parties, and as to whether he can return a fair and impartial verdict on the evidence.

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3. The fact that a juror has casually formed or expressed an opinion which will require evidence to remove, ought not, *prima facie,* to be held a disqualification.

4. The best known methods of securing jury lists should be adopted so as to insure, as far as possible, the selection of the best material obtainable for jury service, and the elimination from that service of the so-called professional talesman.

5. The number of peremptory challenges should be materially reduced.

6. Adequate provision should be made for the comfort and accommodation of the jurors while engaged in the performance of their duty.

A. H. F. L.

Far and away the most interesting paper however, in our opinion, in the American Magazines of this month (March) is Mr. Samuel Rosenbaum's continued *Studies in English Civil Procedure; 2. The Rule-making Authority,* in University of Pennsylvania Law Review. In taking much as a matter of course the relative simplicity and expedition of our procedure we ignore our debt to years of laborious work and experiment on the part of the English Rule Committee. Mr. Rosenbaum's former paper traced the genesis of the Rules of 1875; this deals with the great code of 1883, which, while it has been added to, has never since been revised. An official attempt at revision was made in 1894-6; but it was not given that close personal supervision which Lord Selborne, Lord Coleridge and Sir George Jessel had bestowed on the revision of 1883. Lord Herschell, Lord Halsbury and Lord Russell of Killowen had allowed the sub-committee a free hand; and when the revision was completed it was found to contain matters to which the approval of the more influential members of the Rule Committee could not be extended, and the revision never emerged from the consideration of the Committee of 1894-6. The first problem tackled by the Committee of 1883 was pleading. All pleadings were required to be more concise, and the parties might, if they chose, dispense with pleadings altogether. A set of forms was provided and technical objections on the ground of form, and demurrers were abolished. The scope of the "omnibus summons" was extended, and an interesting innovation was that which permitted the Court to make binding declarations of right "whether consequential relief is or could be claimed

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or not." None, however, of the above improvements had results comparable in breath of scope with the benefits obtained through the development of chamber work in the Chancery Division brought about by the perfection of the "originating summons." For these results we must refer our readers to Mr. Rosenbaum's admirable article. Those who look for general tendencies in the revision of 1883 will note three influences. The first is the increase of official control over the conduct of actions; the second a reversal of the common law practice in an opposite direction. Pleadings no longer are intended to inform the *Court* of the exact issues between the parties, their prime function is to give the *parties* full information. The third tendency is the increased flexibility of judgments. These three features, together with the decline of trial by jury, Mr. Rosenbaum regards as the distinctive contribution of the Judicature Acts towards the reform of civil procedure. In 1884 there was proposed and in 1900 there was introduced into the Chancery Division the "linked judge system," by which there were established three sub-divisions of two judges, the idea being that in each sub-division there would always be both a chamber judge and a Court judge sitting. This plan was first devised by Horace Davey, K.C. (later Lord Davey) and has enabled the judges of that division so to clear off their arrears of work that to the present day that branch of the High Court, long notorious for its inconscionable delays, has kept completely abreast of its trial lists. In 1893 procedure on recovery of summary judgment was made more efficient by the creation of a new trial list known as the "Short Cause List" on which short actions for summary judgment could be placed and disposed of at once if a trial were necessary. In spite however of the improvements of 1883 and subsequent years litigation was slowly drifting away from the Courts into the hands of boards of arbitrators. To win back these suitors a new procedure called "Proceeding to trial without pleadings" was invented. It was not a success. A different but more successful reform, an attempt to provide a separate Court for commercial cases, was long delayed by Lord Coleridge's opposition. He was "entirely opposed to a change which involved the suggestion that all members of the Bench were not equally fit to cope with every subject of litigation." In June, 1894, Lord Coleridge died, and in February, 1895, there was issued the famous "Notice to Commerial Causes," and the

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Commercial List was established. Once entered on the List (which must be by leave of the judge) the summons for directions and all interlocutory applications are heard by the judge himself, not by the master. The judge devotes his entire attention to the List at all times; and as a consequence it is never in arrear, and parties enjoy the great benefit of being able to have a day certain appointed for the trial which is mutually convenient. We have no space for a further review of Mr. Rosenbaum's paper. We hope his Articles will be published later in book form.

In the same issue of the University of Pennsylvania Law Review there is an interesting note on the different rules prevailing in England and America in '*Intervening Acts of a Third Person in Cases of Tort, Proximate and Remote Cause?* There are also articles on *Reduction to Practice of Patentable Inventions*; and *Some Results of the Pennsylvania Public Service Company Law.*

Mr. Hannis Taylor writes forcefully in the Yale Law Journal on *Due Process of Law;* discussing *The Persistent and Harmful Influence of Murray* v. *Hoboken Land and Improvement Company,*[1] which he contends has created a *droit administratif* in the United States. Those of us who heard President Taft's Marfleet Lectures at the University of Toronto will be inclined to agree with Mr. Taylor. In contending vigorously against the soundness of the judgment the writer examines the foundations on which it is supposed to rest, and concludes that the decision is bad. It has however been followed, and with a note of desperation he remarks—"The regulation of the mails, including the freedom of the press, has thus passed under the autocratic control of an administrative system whose authority rests now upon the judicial finding by our highest Court that under the American constitution there is a widening circle of governmental cases not protected by the law of the land."

The Yale Law Journal also contains articles on *Naturalization of Railroads; Taxation of Corporations; Metaphysical Treatment of Disease as the Practice of Medicine,* and *Legal Consequences of the War.* The last paper is mainly concerned with the position of agents in America, cut off from all communication with their European principals.

[1] 1856, 18 How. 272.

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In the Columbia Law Review Mr. C. W. Gregory writes on *Contributions and Requisitions in War*: and Mr. W. W. Cook on *Legal Effects of Equitable Decrees.* There is also a note on *Enforcement of Ultra Vires Contracts.*

The Dean of the Northwestern University Law School contributes to the Illinois Law Review a slashing attack on the Courts of the United States, entitled *The Qualities of Current Judicial Decisions.* He finds little or no acquaintance with legal history, or with "the philosophy and Jurisprudence of the law;" nor is there any discrimination in the use of authorities, and the laws of Evidence in the United States need thorough overhauling. Mr. H. A. Bigelow has a paper on *Natural Easements;* Mr. W. B. Hale on *Directors' Rights to Deal With Their Corporations in Illinois Law;* and Mr. E. M. Lesmann writes on *Miscellaneous Water Rights in Illinois.*

In the current issue of the Harvard Law Review Mr. Roscoe Pound concludes his article on *Interests of Personality,* treating of Honour and Reputation; and Belief and Opinion. He points out that the interest of Honour or Reputation so far as the Common Law recognises it as a proper subject for protection is essentially one of substance; while the non-English speaking world recognizes an interest in Honour as an interest of personality. But these two interests are fundamentally distinct. On the one hand there is the claim of the individual to be secured in his reputation as part of his substance, for in a world in which credit plays so large a part the confidence and esteem of one's fellow men may be a valuable asset. On the other hand there is the claim of the individual to be secured in his dignity and honour as part of his personality in a world in which one must live among his fellow men. As for Belief and the individual interest to express what he will, Spencer has called it free mental motion and locomotion. But recognition of this interest is relatively recent in law and morals. Historically much that appears to be a lack of recognition of the individual interest in free belief and opinion is rather an overemphasis of the interests of the State in the security of some particular social institution. We have largely passed that stage of persecution, but there are cases where the manifestations of belief, as for instance in the case of political opin-

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ions adverse to the right of the federal Government during the Civil War to coerce the States in rebellion, may so affect the activities of the State necessary to its preservation as to outweigh the individual interest or even the social interest in free belief and free speech, citing *Ex parte Vallandigham*.[2]

The next article is one by Mr. R. J. Peaslee on *Ex parte Divorce*. Out of the later cases the real subject of contention has appeared. It is the nature and attribute of the *res* called the marital status. This was first clearly set out in the case of *Haddock* v. *Haddock*.[3] The point is important as involving the decision whether an *ex parte* decree based on jurisdiction given by the domicil of one spouse within a State was a "judgment" within the meaning of the Constitution. The late cases are discussed.

Another discussion involving the Constitution is "*The Constitutional Right to Keep and Bear Arms*" by Mr. L. A. Emery. The paper furnishes another example of the disadvantage under which our neighbours labour because of certain rigid provisions in their Constitution. What at one time was considered so necessary a guarantee of liberty that it was embodied in the federal and most of the State Constitutions, "The right of the people to keep and bear arms" has become a menace. For with the evolution of a distinct class of criminals known as "gunmen" the restraint imposed by this clause in the Constitution upon the legislative power is being seriously considered. From which circumstances we in Canada can derive satisfaction in the thought that the framers of our Constitution did not say "Thou shalt not" to the legislative bodies they called into being. Our liberties rest in our parliaments, not in written guarantees; our safety lies with ourselves, not in the words of our grandfathers.

The paper of Mr. Edwin H. Abbot, Jr., in the same number of the Harvard Law Review is entitled *Ways and Waters in Massachusetts*, and is mainly concerned with the law of that State in respect of natural water courses, artificial streams and surface waters.

[2] 1 Wall. (U.S.) 243.
[3] (1906) 201 U. S. 562.

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In the Irish Law Times (February 13th, 20th, 27th) we find note taken of two Ontario cases *Thibodeau* v. *Cheff*,[4] and *Corby* v. *Foster*,[5] in which the decision of Riddell, J., is approved; there is also a note on *Mutual Wills—Are They Revocable?*

The Law Times for February 20th, has an article on *American Neutrality Problems of International law;* for February 27th on *Trustees and War Rules* and for March 6th another on *American Neutrality.*

We have received the current numbers of Queensland Justice of the Peace; the Madras Law Times; the Madras Weekly Notes; the Criminal Law Review (published at Madras); Calcutta Weekly Notes, and the Punjab Law Reporter; the New Jersey Law Journal, the Students' Helper, and the Australian Law Times.

The February issue of Bench and Bar has an article by Archibald R. Watson on "*The Transfer of Merchant Vessels during War.*" Editorials are: *The Mode of Selecting the Judiciary* and *Judicial Pardons.*

L. D.

[4] 24 O. L. R. 214.
[5] (1914) 29 O. L. R. 83.

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NEW BOOKS AND NEW EDITIONS.

The Principles of Equity intended for the Use of Students and Practitioners. By Edmund H. T. Snell of the Middle Temple, Esquire, Barrister-at-Law. Seventeenth Edition, by H. Gibson Rivington, M. A. Oxon. Scott Scholar, Clement's Inn, Daniel Reardon and John Mackrell Prizeman, 1900 and A. Clifford Fountaine, Clement's Inn, Daniel Reardon and John Mackrell Prizeman, and Travers-Smith Scholar, 1899. London: Stevens & Haynes, 1915.

It would certainly be a work of supererogation to devote much space to welcoming a new edition of "Snell's Equity." We will quote the opening words of the preface to this edition:—'In preparing the Seventeenth edition of "Snell's Equity" we have borne in mind that generations of law students have learned their Equity from "Snell," and that the law student of one year is the practitioner of the next. We have therefore departed as little as possible from the general arrangement and language of the work with which so many practitioners are familiar.' One valuable addition is, however, a short chapter on the effect of the Judicature Acts. On the other hand the chapters on Interpleader and Auxiliary Jurisdiction have been eliminated as being more appropriate to a book on the Practice of the Courts than to a treatise on the Principles of Equity. For the rest there has merely been a slight alteration of arrangement. No elementary book upon Equity has superseded, or made any approach to superseding, "Snell."

The Dominion Law Index embracing *All the Legislation of the Dominion Parliament: and Such Unrepealed Provincial Enactments, and Imperial Statutes, Treaties and Orders as Bear a Special Relation to Canada.* (1867-1914). By Harris H. Bligh, K.C., D.C.L., Librarian of the Supreme and Exchequer Courts of Canada. Third Edition. Toronto: The Carswell Company, Ltd.; London: Sweet & Maxwell, Limited, 1915.

The Public will heartily welcome this new edition, bringing matters up to date, of Mr. Bligh's Dominion Law Index. It covers (a) All the Acts of the Parliament of the Dominion of Canada, repealed and unrepealed, public and private, together with the "Revised Statutes of Canada," the two series: (b) All Acts and parts of Acts, of the several Legislatures of the Provinces now constituting the Dominion, contained

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in the volume known as the "Unrepealed Statutes of Canada" (U.S.C.), published contemporaneously with the Revised Statutes of Canada, (1886); (c) All the Imperial Statutes, Treaties, Orders in Council, Correspondence and Instructions, published from time to time with the Annual Statutes of Canada; together with those published in the volume known as the Orders in Council of 1874 (O.C. 74). The Criminal Code of Canada has received attention, and the various subjects contained therein will be found duly arranged and indexed under their proper references throughout this work.

Notes on the Remedies of Vendors and Purchasers of Real Estate with special reference to instalment-plan Agreements, Rescission, Determination, Relief against Forfeiture. Second Edition. By C. C. McCaul, B.A., K.C., of Osgoode Hall, and of the Bars of Alberta, Saskatchewan, and British Columbia. Toronto: The Carswell Company Limited, 1915; London: Sweet & Maxwell, Ltd.

A second edition of this book is now before us. It calls for a more careful study than we have been able to give it in the time available. We hope to give it a more extended notice at an early date.

English Reports Annotated. 1868 in two vols., annotated to April, 1914; 1900 in two vols., annotated to December, 1913. Editor: Max Robertson, of the Inner Temple and the Midland Circuit, Barrister-at-Law, Editor of "The English Reports" and "The Irish Reports." Assisted by Sidney S. Abrahams, LL.B. (Cantab), of the Middle Temple, and the Midland Circuit, Barrister-at-Law, and other members of the Bar. London: The Reports & Digest Syndicate, Ltd., Stevens & Sons; Sweet & Maxwell, Ltd.; Canada Law Book Co. Ltd.

We doubt if this stupendous work is as well known and as much appreciated as it should be among the profession. The publishers base their scheme upon the grounds which are indisputable, that it is difficult to obtain the reports from 1866 onwards, the incompleteness of each individual series, and the cost entailed in the purchase of the same. To obtain a complete record of the decisions from 1866 down would necessitate buying the various series for this period. There is no doubt about this because there are always some cases reported in the Law Times and the Law Journal which are

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not reported in the Law Reports, and, no doubt, *vice versa*. Moreover there are, some times at any rate, slight variations in the reports, which we presume the compilers will notice whenever they are material. They have announced their intention of re-printing the arguments and judgments *verbatim*, and to annotate the case so that the lawyer may know at a glance whether the decision he is reading has been overruled, followed, expanded, criticised, or referred to elsewhere. There is a thin paper edition to be obtained at the same price as the Library edition, namely, 30s. per volume. There can be no doubt that the series of volumes will form a splendid addition to a lawyer's library. In fact with this series, the Standard Annotated Digest, or the new Imperial Digest now announced, and Halsbury's Laws of England, the young practitioner starting on his career will have a great advantage over his predecessors. Let us hope he will make good use of it.

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THE GAZETTES.

The Canada Gazette for February 27th, 1915, contains the special Fishing Regulations adopted by Dominion Order in Council for Prince Edward Island, Nova Scotia, New Brunswick, Manitoba, Saskatchewan, Alberta, and the Territories north thereof, and British Columbia.

The Canada Gazette for March 13th, 1915, contains letters of appreciation for Canada's gifts from various relief Committees in England; also the following resolution passed by the Corporation of the City of Belfast on January 1st, 1915:—

Moved by the Lord Mayor (Councillor Crawford McCullagh), seconded by Alderman Sir Robert Anderson, Bart:

Resolved—That we, the Lord Mayor, Aldermen and Citizens of the City of Belfast—and we might add of Ulster generally—do hereby record our highest appreciation of the patriotic attitude of the people of the Dominion of Canada, in common with all parts of the British Empire, in the present titanic struggle in which the Empire is engaged, and we tender our most sincere and grateful thanks to the Government of Canada for their magnificent donation of flour which has been received as an earnest of the bond of citizenship between the peoples of Canada and Ireland, whose soldiers are fighting side by side in support of a common flag and a common Crown.

CRAWFORD MCCULLAGH,
Lord Mayor,
Chairman.

The Canada Gazette for March 20th, 1915, contains a notice that the Foreign Office cannot assume any responsibility for the forwarding of money, letters or messages to individual persons abroad. Payments of money to British subjects detained in enemy countries and unable to return to His Majesty's Dominions do not constitute an infringement of the Trading with the Enemy Proclamation, but it may be found necessary to forward such remittances through a neutral country. It is suggested that persons not having friends or correspondents in neutral countries may find it possible to forward the money through Messrs. Thomas Cook & Son, or some similar agency.

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The *Ontario Gazette* for March 6th, 1915, contains a number of supplemental rules of the Ontario Legislative Assembly relative to petitions for Private Bills.

The *Ontario Gazette* of March 27th, 1915, contains an Order in Council altering the limits of the Sault Ste. Marie and Sudbury Mining Divisions.

The *British Columbia Gazette* for March 25th, 1915, contains, in the form of an Order in Council, issued under the authority of chapter 35 of the statutes of the Province for 1915, what may be called a Moratorium Ordinance in respect to mortgages and other instruments charging land with the payment of money. It authorizes any judge of any Court in the province in which any action or proceedings was pending on August 4th, 1914, or has since been or may hereafter be taken, to enforce any obligation under such instrument affecting lands, to postpone payment of any principal money due or accruing due under such instrument, and if any person liable for the money charged by the instrument or any member of his family lives upon the land as his *bona fide* place of residence, to postpone payment of interest as well, and to fix the period to be allowed for redemption, or extend the time already fixed, or to order that no person shall by exercise of power of sale or other extra-judicial process or by entering into possession of the land enforce his right under such instrument or levy any distress.

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LOCAL AND PERSONAL.

The Law Society of Upper Canada on February 4th, 1915, passed the following resolution:—

"That all students of the Law Society who volunteer and enlist for the present war, qualify, and go to the front, and who return in good standing and having borne themselves as members of the Law Society and soldiers ought to do, shall be advanced as follows:—

"First-year students to the second year without examination.

"Second-year students to the third year without examination.

"Third-year students to Call to the Bar and Certificate of Fitness without examination."

The Law Society of Alberta on January 6th, 1915, passed the following resolution:—

Re Students-at-law enlisting for active service.

(1) That students who have enlisted for active service be allowed the time during which they are actually upon active service or are in training for active service in lieu of service under articles.

(2) That any student who is at the time of any examination (except the final examination), upon which he would in the ordinary course have written in order to have completed his three annual examinations, within the term of such military service, be exempted from taking such examination and that this Committee have power to consider cases in which the student has before the time of the examination received his discharge but by reason of his military service has been unable adequately to prepare for the examination and to take such action in such cases as the Committee may deem wise.

(3) That with regard to the final examination, this Committee be given power to provide, for any student whose term of service has expired before his discharge from military duties or will expire before the examination next following his discharge, such examination for admission to the Bar as may seem desirable.

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The Private Bill Committee of the Legislative Assembly has reported in favour of the admission of Controller James Albert Ellis, ex-Mayor of Ottawa, and a member of the legislature prior to the election of last June, to the Bar of this Province. Mr. Ellis has not formally studied law, but has been for twenty-five years clerk in lawyers' offices, and through holding municipal offices has gained a practical knowledge of municipal law, and wishes to enter into partnership with his son.

Joseph P. Nellis, for 21 years City Solicitor of Woodstock who resigned recently on account of failing health, died last month, aged 76.

Law students in Manitoba will be enabled, although not University graduates, to complete their law course in future in four years instead of five, under an amendment of the Law Society Act passed by the law amendment Committee of the Legislature on March 10th, 1915.

At a meeting of the law students held on March 4th ult., a Society known as the Law Students Union of Prince Edward Island, and having for its objects the advancement of the common interests of the student body, was organised. A constitution and by-laws were drawn up and, with some alterations and amendments, adopted. The following officers were elected for the ensuing year:—Hon. President, Hon. J. A. Mathieson, Premier and Attorney-General; President, S. S. Hessian; Vice-President, Norman McLeod; Secretary-Treasurer, Justin Hynes; Executive Committee, B. Howatt, A. Leard, and C. P. McCarthy.

Mr. R. W. Lee, has left Edmonton, where he has been practicing law for a year past, and has opened an office at Provost, Alberta.

Mr. Justice Maclennan, the new Quebec Superior Court judge, took his seat on the Bench for the first time on March 6th last and received the congratulations of the Bar.

One of the first Canadian law students whose death in the present war has given him a foremost place upon our

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Roll of Honour is Lieutenant Douglas Morison of the Wiltshire Regiment. He was reading for the Bar of British Columbia when the war broke out and obtained his commission last November.

At the meeting of the Canadian Bar Association in Montreal last week the following were selected to represent on the council Manitoba, Saskatchewan, Alberta and British Columbia:—

Manitoba—Isaac Pitblado, K.C., C. P. Willson, K.C., A. R. Hughson, K.C., R. M. Whittaker, T. B. Coyne, K.C., and T. A. Hunt, K.C.

Saskatchewan—W. M. Martin, M.P., Regina; P. E. Mackenzie, K.C., Saskatoon; J. A. M. Patrick, Yorkton; O. S. Black, Weyburn; W. B. Willoughby, K.C., M.L.A., Moose Jaw; Donald Smith, K.C., North Battleford.

Alberta—W. A. Regg, Dr. Conybeare, K.C., Lethbridge; O. M. Biggar, Edmonton.

British Columbia—W. F. Taylor, K.C., L. G. McPhillips, K.C., E. P. Davis, K.C., W. Boswell, K.C., A. Lucas, Vancouver; C. R. Hamilton, K.C., Nelson.

The following were elected as added representatives on the Council from the province of Quebec:—F. C. Meredith and Gonzales Desaulniers, K.C., Montreal; Ls. St. Laurent, Quebec, and J. E. Perrault, Arthabasca.

We note with regret the death of Mr. William Cook, K.C., who for many years has had an extensive practice in the Courts of Quebec, including the Admiralty Court. Both the Admiralty Court and the Superior Court at Quebec shewed honour to his memory by adjourning their proceedings on March 23rd, to enable Bench and Bar to attend his funeral.

A. G. Browning, K.C., for many years Crown Attorney at North Bay, and J. H. G. Wallace, son of the late N. Clarke Wallace, M.P., have formed a partnership, and will practise in Toronto under the firm name of Browning & Wallace.

Alexander Campbell Shaw, of Perth, barrister, has been appointed Crown Attorney and clerk of the peace for the county of Lanark. He succeeds the late H. G. Malloch.

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Ex-Ald. Michael Houston, dean of local barristers, has completed a half century at the Chatham bar. He entered the law office of the late E. W. Scane on February 17th, 1865, and was admitted to the bar in 1870. Later he was in partnership with Mr. Scane and in more recent years he has been senior member of the firm of Houston & Clark.

Mr. Justice J. G. Forbes, of St. Johns, N.B., has retired from the Bench, to which he was appointed in 1895. Born in 1838, he was called to the New Brunswick Bar in 1865, and so became recognised for his ability and learning.

We noted in our last issue the recent retirement of Sir Charles Peers Davidson, from the Bench of Quebec. In the course of a valedictory address to the Bar Association at the Montreal Court House, he said, speaking of the War:—

"There runs throughout Canada a note of almost exaltation that we share in the sacrifices which a place among the Allies entails. We are the sons and daughters of Imperial races, who have been conspicuous for fighting qualities and heroic deeds. The ideals for which we fight inspire us with loftier qualities, will increase the moral stature of Canadians, and will add a new quartering to the arms of our courage."

"I hold to a firm conviction that every man should at some period of his life do voluntary military duty," said Sir Charles, who went on to speak of the value of cadet battalions and the Boy Scouts in teaching permanent lessons of patriotism. The coming manhood of the country, would, he felt sure, in increasing measure be prepared to withstand the avarice or wrong doing of other nations.

Mr. A. F. Sample, who has been working as a law student with the firm of Turnbull and McCausland of Regina, has won the gold medal annually awarded by the Law Society of Saskatchewan.

The annual meeting of the Nova Scotia Barristers Society for the election of officers and the transaction of business took place at Halifax on February 26th. The following officers were elected:—President, Hector McInnis, K.C.; Vice-President, John J. Power, K.C.; Treasurer, J. M. Davidson; Secretary, W. R. Foster; Council—C. J. Burchell, K.C., Stuart Jenks, K.C., J. A. Chisholm, K.C., W. H. Covert,

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K.C., W. A. Henry, K.C., E. P. Allison, K.C., L. A. Lovett, K.C. Ex-officio members of Council—His Lordship the Chief Justice and Hon. Attorney-General Daniels, K.C. Court House Commission member, Dr. J. J. Hunt, K.C. The members representing the counties outside of Halifax were unanimously re-elected.

At a largely attended meeting on March 2nd in the moot court room at Dalhousie Law School, the student body of the Faculty of Law declared their independence from domination of the United Students' Council of Dalhousie University. The aim of the move is to establish in law a self-governing body absolutely independent of the other faculties as regards student government.

In addition to those already mentioned, we regret to have to notice the following deaths among members of the profession:—

Mr. Alexander Edward Garrett, of Vancouver, B.C., who died on February 21st. He was an old Upper Canada boy; and after practising law in Hamilton, Ont. for some years, moved to Vancouver in 1898, and was called and admitted there the following year.

Mr. Alexander McDonald White, a prominent barrister of Moosomin, Sask., died on February 26th.

Dr. James Douglas Phinney, one of the oldest members of the New Brunswick Bar, and for eight years, a member of the Provincial Legislature, who died on February 28th, at Fredericton, in his 71st year.

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HIS HONOUR JUDGE HUGHES,

LATE COUNTY COURT JUDGE OF THE COUNTY OF ELGIN.

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The Canadian Law Times.

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THE LATE JUDGE HUGHES.

We have to record with great regret the death of His Honour, Judge David John Hughes, at St. Thomas, on April 21st, in his 95th year. Judge Hughes was born in Kingsbridge, Devon, on May 7th, 1820, less than five years after the Battle of Waterloo. In 1832 his father brought his family to Lower Canada, and died two weeks after reaching Montreal. He was adopted by Mr. Gideon Acland of Perth, Ontario, who in 1835 moved with his family to St. Thomas to practise law. In June, 1837, Mr. D. J. Hughes entered the Law Society at Osgoode Hall as a student, and was called to the Bar of Upper Canada in 1842.

During the rebellion of 1837 he joined the London troop of cavalry. Ever afterwards Judge Hughes was an ardent admirer of horses and was one of the best handlers of the ribbons in St. Thomas. He was appointed master extraordinary and examiner in chancery by Vice-Chancellor Jameson for the London district; and on December 13th, 1843, began the practise of law in Woodstock, remaining there until September, 1847, when he went to London and entered into partnership with Mr. Wilson with whom he practiced until he was appointed judge of the County and Surrogate Court in Elgin, in October, 1853. Judge Hughes held Assize Courts at the request of justices of the High Court in twenty-seven different counties of the province. He was retired by Act of Parliament on account of his age, in 1903. Judge Hughes was married on December 13th, 1843, to Miss Sarah Richardson, eldest daughter of the late Richard Richardson, cashier of the Bank of Upper Canada, London, Ont., and a sister of the late Mr. Justice Richardson, of Regina, N.W.T. Mrs. Hughes predeceased her hus-

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band a number of years ago. His second wife, who survives, was Miss Adelaide Rowland of St. Thomas, daughter of the late Edward Rowland, Collector of Inland Revenue at St. Thomas, and formerly of London West.

Besides his widow, the late Judge Hughes is survived by three daughters and one son.

The St. Thomas Times of April 14th last thus comments upon the deceased Judge:—

'The death of His Honour Judge Hughes marks the close of a long and remarkable career. His wonderful vitality, nearly a quarter of a century after having passed the milestone of man's allotted span, had for years rendered the venerable jurist a notable figure in the life of the community. With a record of one year more than half a century actually presiding on the bench in our courts of law, the late Judge Hughes was for many years a dominating personality in legal circles in this country. A man of fixed convictions and unalterable principles of the highest order, he dispensed justice impartially according to the dictates of his well-balanced legal mind, and to his careful interpretation of the statutes of the land. His grave, scholarly and stern cast of countenance masked a kindly spirit, and his keen, shrewd eye could twinkle with whatever humour appealed to him. While undoubtedly he owed his longevity and splendid constitution largely to the sturdy stock from which he descended, he also owed much to his rational mode of life and the fact that his constitution never suffered ill-treatment at his hands. The name of His Honour Judge David John Hughes will ever be inseparably bound up with the annals of Elgin and, to some extent, Middlesex, counties. His passing severs one of the fast disappearing links connecting Elgin County and St. Thomas with the early days of development in every walk of life.'

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BY THE WAY.

We have received a circular of a 'Collegiate Anti-Militarism **League** of the United States,' the president and treasurer of which bear the suggestive names of Karl G. Karsten, and A. L. Trachtenberg. We are in deep sympathy with the avowed object of the League, and would respectfully suggest that the best way to promote it is to enlist and go and help to smash Prussia.

The legislature of Manitoba during the session just concluded passed a War Relief Act of a kind, so far as we know, unparalleled elsewhere, but doubtless quite justifiable upon the sound principle that nothing is too good for the men, the very flower of their day and generation, who have come and are now coming forward, ready aye ready to give their lives for the cause of the Empire, and of more than the Empire, —for the cause of law and of liberty and of the fundamental principles of Christianity itself. The Act to which we refer provides that:—

'During the continuance of the war it shall not be lawful for any person or corporation to bring any action or take any proceeding, either in any of the civil Courts of this Province or outside of such Courts, against a person who is, or has been at any time since the first day of August, 1914, a resident of Manitoba, and has either enlisted and been mobilized as a volunteer in the forces raised by the Government of Canada in aid of His Majesty in said war, or has left Canada to join the army of His Majesty, or of any of his allies in the said war, as a volunteer or reservist, or against the wife or any dependent member of the family of any such person, for the enforcement of payment by any such person of his debts, liabilities and obligations existing or future, or for the enforcement of any lien, encumbrance or other security, whether created before or after the coming into force of this Act, or for the recovery of possession of any goods and chattels or lands and tenements now in his possession, or in the possession of his wife or any dependent member of his family, and, if any such action or proceeding is now pending against any such person, the same shall be stayed until after the termination of the said war.'

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The Act goes further and enacts that:—

'If any resident of Manitoba shall enlist and be mobilized as a volunteer in the Canadian forces aforesaid or leave Canada to join the army of His Majesty or of any of his allies in the said war as a volunteer or reservist after the commencement of any such proceedings, the same shall in like manner be immediately stayed until the end of the said war.'

This legislation goes even further than the English Courts (Emergency Powers) Act 1914, referred *infra* p. 393, and is obviously unlike our own Moratorium Act inasmuch as it is exclusively for the benefit of the men who are at or going to the front, their wives and family dependents, and inasmuch as it stays all proceedings of every kind, and not only those directed to enforcing claims against land. Indeed it specially provides that:—'This Act shall not prevent a mortgagee or person having a charge or security on land from the right to collect and receive the rents or rentable value of such land over and above an amount equal to two thousand dollars per annum.' Well done Manitoba!

We are glad to be able to put before our readers in this number the full text of Sir James Aikins' Presidential address to the Canadian Bar Association at its recent meeting. We are sure it will be widely read and widely admired. At the same time we ventured in our last number, to cross swords with Sir James on the preference expressed by him for codification over our case law system. We may add to what we then said the words of Mr. Goady in his Introduction to Law, that—'English lawyers fear the paralysing effect of a Code upon legal development. They prefer to leave the law in a state of solution rather than to precipitate the rules in a form presenting greater subsequent difficulty of transformation.' All will agree, however, that certain portions of the law, such as criminal law, admit of codification much more than others: nor can it be denied that to do justice to our case law system requires a strong Bench, and an able and industrious Bar. We also, with great respect, think that Sir James Aikins overestimates the debt which the common law owes to Roman law. Pollock and Maitland, in their brilliant History of English law, say:—'Coming to the solid ground of known history, we find that our laws have been formed in the main from a stock of Teutonic customs, with some additions of matter, and consider-

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able additions or modifications of form received, directly or indirectly, from the Roman system; and both the Germanic and Romanic elements have been constituted or reinforced at different times and from different sources.' As to Bracton, Sir Henry Maine's words, quoted by Sir James, are not supported by modern scholarship. The late Professor Maitland was a much higher authority on such a subject than Sir Henry Maine. 'Romanesque in form, English in substance,' is the way in which Professor Maitland and Sir Frederick Pollock characterize Bracton. 'The main matter of his treatise' they say, 'is genuine English law laboriously collected out of the plea rolls of the King's Court. . . . His endeavour is to state the practice, the best and most approved practice, of the King's Court, and of any desire to romanize the law we must absolutely acquit him.'

A valued and learned correspondent has discovered a resolution of the Law Society of Upper Canada of June 20th, 1840, which it seems well worth while to publish. In Trinity term, 3-4 Victoriae, on May 20th, 1840, it was resolved by Convocation:—"That a member of the Law Society appointed to the office of judge of the Province doth not by virtue of such appointment cease to be a member of the Society.

"That a member of this Society or Master of the Bench thereof appointed to the office of judge of this Province is . . . disabled only while he continues to hold such office from exercising the function of such Mastership."

The history of this resolution, our informant states, is that when Mr. Justice Sherwood resigned from the Court of Queen's Bench, he enquired of the Benchers whether the Law Society recognised him as one of the Benchers, a position he held before his appointment as judge. It had previously been determined in 1837 that Attorney-General Jameson had not by becoming Vice-Chancellor of Upper Canada disqualified himself from acting as a Bencher; and he continued to be Treasurer for some time thereafter.

The New York County Lawyers Association possesses a 'Committee on Professional ethics' which undertakes the interesting and useful function of answering hypothetical questions as to what would or would not be professional

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conduct in given circumstances. The by-law of the Association provides that the committee 'shall be empowered when consulted to advise enquirers respecting questions of proper professional conduct, reporting its action to Board of Directors from time to time.' Questions may be submitted to it *ex parte*. The question and answer which we have before us relates to a matter of professional etiquette of which, perhaps, some even of our own younger professional brethren might with advantage be reminded.

Question. A is in possession of a tract of land under claim of ownership. B also claims ownership. Both have consulted counsel in regard to their respective claims, and the counsel have consulted with each other. B's counsel proposes to A's counsel that B bring an action in ejectment to test the title and that a stipulation be entered into before the action is commenced that the judgment shall be without costs. A's counsel refuses to make the stipulation. Afterwards B's counsel goes to A and induces him to sign, in his individual capacity, the same stipulation which his counsel had refused to make for him. A's counsel ascertains the fact and charges B's counsel with unprofessional conduct, which B's counsel denies, defending the propriety of his act upon the ground that A's counsel was not an attorney of record in the matter.

Was or was not B's counsel guilty of unprofessional conduct?

Answer. In the opinion of the Committee, the conduct of B's counsel was unprofessional. It violates the following tenets of Canon 9 of the Canons of Ethics of the American Bar Association, in the provisions of which, in its application to the present case, this Committee concurs:—

"A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel: much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel."

It seems to us that this institution of a standing Committee of professional ethics is an excellent one. If it does nothing else it must tend to preserve a sensitive conscience among lawyers as to what is, and what is not, 'professional' conduct. We would respectfully suggest to Mr. E. F. B. Johnston, K.C., to follow up his recent paper read before the Canadian Bar Association by taking measures to have a like

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Committee established in this province, either by enlarging the functions of the present Discipline Committee of the Law Society, or otherwise howsoever.

Our attention has been called by a valued correspondent to an amendment which has been made to the provisions of our version of the Statute of Frauds, by 3-4 Geo. V. ch. 27, sec. 4, (now R. S. O. 1914, ch. 102, sec. 4) in putting *agreements for* a lease at rack rent for a term not exceeding three years on the same footing as a *lease* of like kind. As every lawyer knows ever since the Statute of Frauds was enacted in 29 Charles II., there had been the distinction that though a verbal lease in such case was valid, an agreement for such a lease, like all other agreements relating to an interest in lands, had to be in writing to permit of any action being brought upon it. It seems strange that so important a change in old established law should be made in a way not likely to come to the knowledge of the public except through bitter experience. It may have escaped the notice of many members of the profession, as it did our own. We note too that section 4 of the original Statute of Frauds now ranks in our Statute as section 5. So much learning surrounds the sections of the Statute of Frauds under, and so much convenience is found by adherence to, their original numbering, that it seems a pity that, the same numbering was not preserved so far as possible in our own Statute of Frauds, which, of course, is in the main a transcript of the original. These observations are not made in any carping spirit, but as illustrating the desirability of having the most competent and critical supervision of all amendments to the statutory law especially in the case of Acts which alter what has been well called 'lawyers' law,' as distinguished from mere administrative law.

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ADVANCING THE SCIENCE OF JURISPRUDENCE IN CANADA.[1]

The purposes of this Association are professional, they relate only to our profession and its advancement; to the law and its administration and improvement. They are Canadian and apply equally to all races and languages and creeds, with which they do not interfere, nor will they conflict with any existing provincial Law Societies or organizations—on the contrary, the Canadian Bar Association seeks the co-operation of these. Its design is usefulness.

Faithful and efficient service has been and is a characteristic of our profession; it is due to the client, expected by the people, and willingly given by the Bar. The highest title and dignity conferred on a member of the English Bar before 1880 was that of a serjeant, who is the "serviens" of Bracton's time—the "serving man" of about the thirteenth century. For this purpose of service members of our profession are required to be learned in the law and the principles of Government, to be of moral character and industrious, usually to take an oath of office promising to uphold the Constitution of the land, to aid in the administration of its law. Their conduct after being called is always under scrutiny by fellow-practitioners who are zealous for the honour of the Bar. For any dereliction in duty they are liable to discipline by the society to which they belong and by the Court before which they practice. They are thus certified to the people as those having general knowledge of affairs and learning beyond the ordinary, as capable of giving advice on the written and unwritten law which governs the people and their business, as worthy to be trusted counsellors of persons in any occupation or in positions of authority. To the credit of our profession be it said that most who have entered it have recognized the obligations and responsibilities thus assumed and have generally performed them.

Few indeed have spent energy and time and money in the preparation for admission to the legal profession and have entered it with the primary object of thereby making money. Those who have done so have shewn at the outset lack of judgment and good taste, both essentials to true professional

[1] Being the Presidential Address delivered at the opening of the proceedings of the Canadian Bar Association at the meeting of the Association at Montreal on 19th ult.

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success. It is not a calling or instrumentality suited to that purpose as is the business of the merchant, manufacturer or miner. Persons who have thus sought to commercialize it, to prostitute it to such an end in itself have lowered the professional tone and so lost the respect and esteem of their fellow-practitioners and of the people. They take no interest in the advancement of our profession and do not possess its spirit. At all times ready to make use of anything to promote their own selfish interests, they merit the remark of Lord Bacon:—

> "They cared not what became of the ship of state if so be that they could save themselves in the cock-boat of their fortunes."

The lawyer's sphere cannot be as clearly defined as that of the doctor of medicine or the minister. His range is wider, *hic et ubique,* his duties multifarious, his training more versatile. Moreover, the constant practice in caring for his clients, in assuming their burden and the direction of their many affairs, added to the training of his student life, naturally increases in the lawyer that habit of service and usefulness for others. The frequency with which he examines both sides of the various questions submitted to him tends to impartiality and a judicial and temperate habit of mind. Further, the vigorous participation in affairs with the purpose to do right amid the many lures and temptations incident to his vocation is the most wholesome moral tonic which nature can have. Such employment does not certainly cultivate the scruples of the casuist or the glowing visions of the seer, but it does stimulate and strengthen for the robust work of the world, and the accomplishment of noble purposes, which end in things well done and not in dreams. Time was when the lawyer was regarded as aloof from the practical affairs of the world, as the learned and dignified aristocrat of society who did not concern himself with the daily duties of common life or the struggle of the people to improve their condition. Now, in our democratic country the members of the profession are not only with the people but of the people, working among men, advising in their personal affairs, sympathising in their efforts, guiding in their business, aiding in their social movements for reform, taking share in all the departments of public government, yet, withal, maintaining the professional ideals of the past, their intellectual attainments, dignity, strength of honour and independence of char-

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acter, which will not cringe before Courts, or be carried away by popular emotions or a hostile press. The statement made by Thomas Lord Erskine can be repeated by most members of our profession to-day:—

> "I will forever at all hazards assert the dignity, independence and integrity of the English Bar without which impartial justice, the most valuable part of the English Constitution, can have no existence."

We do not claim that all members of the Bar are fearless, learned, faithful in the discharge of their duties and governed by the best ethics. We do not contend that all are impartial and of judicial mind or that, as opportunity offers, all wisely and unselfishly endeavour to improve our laws and the administration of justice, for there are some who, looking backward, see only good work in the past and refuse to move, while others, closing their ears to the voice of experience, would create all things new on an *a priori* basis. But the aim and efforts and trend of the profession is toward its ennoblement and its usefulness. Sir Walter Scott, who by the way was a lawyer, made a fair criticism of our profession and it is as applicable now as in his time:—

> "In a profession where unbounded trust is necessarily imposed, there is nothing surprising that fools should neglect it in their stupidity and tricksters abuse it in their knavery. But it is more to the honour of those, and I will vouch for many, who unite integrity with skill and attention and walk honourably upright where there are so many pitfalls and stumbling blocks for those of a different character. To such men their fellow-citizens can safely entrust the care of protecting their patrimonial rights, and their country the more sacred charge of her laws and privileges."

I think I have thus outlined correctly the spirit, the ideals, the learning and the qualities which characterize the Canadian lawyer and how, as an adviser in human affairs he accompanies his clients into their respective avenues of life.

If I have, it is manifest that these and his opportunities of useful service impose upon him duties and responsibilities not only of a private but public nature far beyond those resting upon persons in other employments. In a general way we recognize this but we do not always give effect to the conclusion that we should do what we are so well qualified to do both individually and as a profession in which con-

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certed action is not only possible but necessary for effective work. As a profession in Canada are we not sadly lacking in *esprit de corps* and wanting in unity? We are a profession not a craft. We may take lessons from the Dominion Medical Association and the Canadian Society of Civil Engineers, and would do well to consider the benefits of existing Dominion associations and business men who in their day and generation are in these things wiser than "the children of Light," their legal advisers. They know the strength coming from unity.

However excellent the British North America Act as the Constitution of our country, however wise its distribution of legislative powers, it cannot create or assure a real united Canada unless the spirit of union and co-operation is pervasive among the people. Our provinces are far-flung, and feelings of mistrust, lack of sympathy or cordiality, asperities which may have happened between the respective bodies of citizens in the different provinces, arise very largely from the fact that the separated communities do not know or understand each other, or their aims and ideals, or the various steps which may have been taken toward the development of those ideals and the accomplishment of those aims. Yet every true Canadian in his heart purposes a strong, united Canada, founded upon that spirit of freedom, justice and honour inherited from our great ancestors.

True it is that, owing to our historic beginnings, there will be diversity in our population, but that will not prevent oneness. Every diversity in our unity may make for our safety and ennoblement. Different grafts on the one national stem, nourished by the same soil, refreshed by the same showers, gladdened by the same sunshine, bringing forth blossoms of various hues, the people of Canada should produce the one rich fruit—one true and virile Canadianism. In this our profession has an important and essential part to play.

That country is fortunate which has dwelling in it a body of men, usually dispassionate and just and learned men, who have accommodated the teachings of experience to progressive energy and a wise philosophy, and who are willing to advise and assist in its development. There never was a time when the trained and experienced members of the Canadian Bar, mindful of the obligations which rest upon our profession, resting there, because, as in the case of the dove when first

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sent from the Ark, there is nowhere else to rest, and willing to meet those responsibilities, could render more useful service to our people and country than now, in helping to consolidate our nation and to improve our jurisprudence.

The stated objects of the Canadian Bar Association indicate the path along which, in the public interest and our own, we should proceed. The one first mentioned is:—

"To advance the science of jurisprudence."

The seemingly proper use of the word "science" in this connection is "a particular branch of knowledge or study." So our Association undertakes to make an effort to advance that particular branch of knowledge—jurisprudence.

This word jurisprudence also has various interpretations. It may mean as one authority states: "Knowledge or skill in law." Thus Blackstone says: "I wish unto him the gladsome light of jurisprudence." If that be the meaning intended in our Constitution or in that of the American Bar Association, it seems unnecessary to add the word "science."

Another definition is:—

"A system or body of law: a legal system."

So Buckle says the noblest gift Rome bequeathed to prosperity is her jurisprudence. The practical result, however, will be the same whichever interpretation is used, for if with our profession only resides that knowledge of jurisprudence, then on us also is the duty to ourselves and to our country of improving and advancing it.

The Canadian lawyer knows the statement to be inaccurate that the law in Quebec differs from the law in the other provinces in that the former is the Civil Code, the other the common law, for he knows:—

(1) That there applies to all the Dominion that body of the law adopted by our Federal Parliament touching matters within its jurisdiction, e.g., the laws relating to citizenship, crime, the regulation of trade and commerce, banks, militia and defence, patents, etc.

(2) That those questions which come within the public law, using a general term, are governed in Canada, including Quebec, by the law of England as modified by legislation of the central authority.

But, in so far as the provinces have jurisdiction under the British North America Act, and speaking generally, the system of law known as the Civil Code of Lower Canada does

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govern in Quebec, and the common law system in the other provinces.

Mr. Justice Cross explained in general terms the difference between these systems:—

> "The binding authority of precedents is characteristic of English law. With us the Code is the law whilst decisions are particular applications of the law."

Dr. F. P. Walton, former Dean in McGill University, in a recent Article on the subject of the Legal System of Quebec says:—

> "The law of property and civil rights which is peculiar to the province of Quebec has, to a large extent, been codified in the Civil Code of Lower Canada, and in the Code of Civil Procedure, the latest revision of which was in 1897. With the exception of the mercantile law, of which an outline is given in the Civil Code, that Code corresponds in form and contents somewhat closely to the Code Civil Français, formerly designated as the Code Napoleon. . . . It is probably true that the Code of Civil Procedure is composed to the extent of one-half or more of rules of English origin. . . . It will be seen that the special rules of law peculiar to the province of Quebec are to be found mainly in the Civil Code of Lower Canada, in the old law so far as this has not been abrogated by the Code, in the provincial statutes and in the decisions of the Courts. . . . As early as in 1785 a statute was passed introducing the English rules of evidence in commercial matters. . . . After the Cession the commerce of the country, and more particularly the foreign trade, fell mainly into the hands of the English-speaking part of the community. Their business was principally with England, with the United States, or with the other provinces of Canada, and all of these countries were governed by the English law. It was natural, therefore, that English commercial usages should become more familiar than French, and that in the Courts great deference should be paid to the decisions of English judges who had explained the English usages. . . . It must not be forgotten that English commercial law in its present shape is mainly the creation of the Eighteenth Century, and is to a large extent the work of Lord Mansfield and other judges who applied in practice and elevated to the rank of rules of law, the customs of merchants and the theories about these customs, formulated by civilians, mostly French or Dutch. . . . The commissioners who drafted the Civil Code of Lower Canada state very clearly the difference between the commercial law and the civil

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law of the province in regard to their origin." They say:—'In a few instances the rules of commercial law may be found in the statute book or in the ordinance of France, but much of it is to be sought in usages and jurisprudence. Our system, if system it may be called, has been borrowed without much discrimination partly from France and partly from England; it has grown up by a sort of tacit usage and recognition, without any orderly design or arrangement, and has not as yet received any well-defined or symmetrical form from the decisions of our Courts. . . . Much of what has been established by usage may more safely be left to be interpreted in like manner and to be modified as new combinations and experience of new wants may suggest.'"

To those who give any consideration to the subject it is evident there exists a strong similarity between the provincial commercial law of Quebec just referred to and that of the other provinces. But there are other fundamentals common to the Civil Code of Lower Canada and the common law of the other provinces. Both have one common ancestor, the Roman Code. As pointed out, the Civil Code of Lower Canada corresponds somewhat closely to the Code Civil Francais, sometimes designated as the Code Napoleon. The father of that Code was a lawyer, a Doctor of Laws of the University of Pisa, M. L'Abbé who says:—

"de Rome nous avons admis et nous observons encore presque tous les principes de droit privé quoique notre organisation sociale soit profondement différente."

It is to be noted that in respect of real property the Code of France reproduced the Roman law; it differs from the old English system of tenures, of descent and transfer. This, however, is not material for our consideration for in most provinces the old English system has been so modified by statute as to be scarcely recognizable, at all events, in respect of that portion of our Real Property law in general use. That the Roman law was an important source of our common law is not doubted. Bracton, a Chief Justice of England in the reign of Henry III., about the middle of the Twelfth Century, wrote his commentary. Sir Henry Maine says about this:—

'One of the most hopeless enigmas of the history of jurisprudence, is that an English writer of the time of Henry III. should have been able to put off on his countrymen, as a compendium of pure English law, a treatise of which the entire form and a third of the contents were borrowed from the Corpus Juris.'

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Later authorities on jurisprudence, however, conclude that external historical evidence and the internal evidence of Bracton's work shew that no inconsiderable part of the Roman law had previously become a component in the English law, and that Bracton reproduced in his work those portions of the Roman law which were in use as part of the English law and usage, and applied by the Courts and judges as such, About his day students were taught Roman law in Oxford; English authors wrote on it. In 1701 Chief Justice Holt. delivering judgment in the Postmaster General's case said:—

> "And this is the reason of the civil law, which, though I am loth to quote, yet inasmuch as the laws of all nations are doubtless raised out of the ruins of the civil law, as all governments are sprung out of the ruins of the Roman Empire, it must be owned that the principles of our law are borrowed from the civil law and therefore grounded upon the same reason in many things. And all this may be, though the common law be out of mind."

Baron Fortescue said in another case:—

> "The law books of Bracton and Fleta are the ancient law of the land extending to all cases. . . . These law books are so strong, that there has been no way thought of to evade them but by denying the authority of them and calling them 'civil law' . . . I have never known them denied for law, but when some statute or usage time out of mind has altered them."

Baron Montague said:—

> "It is objected that this is civil law; that may be, and yet it may be and is the law of the land also, and these books are often quoted by the greatest judges and lawyers heretofore in England and allowed as law:" (Fortescue's Rep. pp. 401-440.)

Blackstone included Glanville and Bracton in the list of venerated authorities. Many of our old and best known common law maxims, forms and practices, supposed to have been born on English soil, were imported from Rome. Mr. Macfarland, at the American Bar Association meeting in 1913, said that "if our common law would return what it took out of the Roman Code it would have nothing left but its barbarous usages and customs." Time does not permit to enlarge on this.

Not only is there the same jurisprudence in Canada respecting public law and all subjects coming under the Federal jurisdiction, not only something in common in the Civil Code and common law respecting commerce, not only some

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blood relationship through the absorption of the principles of Roman law, but there is also a force at work the trend of which is toward greater similarity in that jurisprudence which is under provincial jurisdiction. That force is the insistent demand and urgent need of some codification of the local laws in the provinces where the common law system prevails. The common law proper is a law library which commences with the Year Books and ends with the last law reports. If in this library are included the Scottish and Irish reports, our provincial reports, and those of the United States to which we sometimes refer, we shall not be far wrong in saying there are seven thousand volumes of reported decisions. Sir Frederick Pollock says that down to 1895 there were over eighteen hundred volumes of English reports alone to which a lawyer is likely to refer. These have increased in twenty years. They contain, I am told, at least one hundred thousand decisions which are constantly being added to. Of Canadian reports there are eight hundred and fifty volumes, and these too are receiving yearly additions. The Canadian lawyer also has to consult the revised or consolidated statutes of the Dominion and of the Provinces, and all Acts passed since such consolidation and revision. I find that in 1913 and 1914 the following numbers of public acts were passed in Canada:—

Parliament of Canada....	116	
Legislature of Alberta....	50	
" of British Columbia	166	
" of Manitoba...	224	
" of Ontario....	144	
" of Quebec.....	125	(In 1912 and 1914 no statutes 1913.)
" of New Brunswick	91	
" of Nova Scotia	125	
" of Prince Edward Island	43	
" of Saskatchewan	67	
Council of Yukon.....	27	Ordinances.
	1,178	

Our public Acts are frequently ill-drawn and fragmentary, containing unnecessary, meteoric and disturbing provi-

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sions. So the originating member, to the delight of his admiring electors, keeps adding 'line upon line, line upon a line, here a little and there a little.'

The legal adviser has also to consult hundreds of Rules of Court made under legislative authority and having the force of statutes.

The publication of the reports has, in too many instances, been commercialized and the judgments reported in them are not always carefully chosen. Apply the recent statement of Mr. John Bassett Moore respecting American reports to our reports and statutes as well, and we have a fair statement of the case:—

> "The output is little regulated and with each Court (and Legislature) there is connected a pipe to convey its product to the centre of distribution from which, day by day and year by year, there is pumped out as through a great main upon a gurgling, gasping, sputtering Bar a turgid stream of judicial decision (and legislative enactment.)"

And so Courts and legislatures go ceaselessly on, piling Pelion on Ossa, and Olympus on both, to the dismay of the bewildered lawyer and a helpless people. When will there appear from those modern Sinai a follower of the great lawgiver with a suitable Code? It was no flight of imagination but a statement of fact when Tennyson wrote:—

> The lawless science of the law,
> The codeless myriad of precedent,
> The wilderness of single instances,
> Through which a few by wit and fortune led
> May beat a pathway out to wealth and fame.

It is said that our reports supply such information that no lawyer need take a step in the dark. His difficulty, however, is in groping to find the light in which to make the step. Those judgments come from many Courts and judges who have varying qualities, and in differing jurisdictions and environments, delivered in different decades, and result in an irregular and incomplete development of the law on almost every subject. Great points are left undecided, trivial ones receive elaborate judgments. Judges cannot make a complete law on any subject. The multiplicity and conflict of decisions create uncertainty. Nevertheless, the value of these reports is incalculable: a mine of wealth, they contain the accumulated radium of legal experience of many generations.

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They disclose an excellent judicial legislation which will benefit both the legislators and the lawyers. Bentham says:—

> "It affords for the manufactory of real law a stock of materials which is beyond price. All the libraries of Europe would not afford a collection of cases equal in variety, in amplitude, in clearness of statement, in a word, in all points taken together, in instructiveness."

But they are to the legislator, the lawyer, and especially to the people a dense and trackless forest, rioting in the luxuriousness of its own riches. It has growth of shrub and clinging vine and tangled under-brush, also great decisions like trees of giant bole which have weathered the tempest shocks of centuries. Well it may be said of such unmatched excellence 'its goodness growing to a plurisy dies in its own too much.'

What then is the remedy? What else can it be but to compress, to write the principles which have been settled by decisions or statute in a well arranged Code? In 1886 the American Bar Association, led by David Dudley Field and John F. Dillon, after hearing a number of eminent lawyers, resolved:—

> 'The law itself shall be reduced, so far as its substantive principles are settled, to the form of a statute.'

Of the three varieties of codification the one thus suggested seems the most likely to be adopted because the least disturbing and the most practicable, namely, the preparation and legislative enactment of a digest of the established principles of the existing law.

A second form of codification is to use the existing law as a base and amend it as may be deemed advisable for the purpose of removing anomalies and then enacting it as amended. This was the principle under which the French Civil Code was formed and it has stood the test of a century with but little change. The Roman Code upon which it was based has the longest known history of any set of human institutions.

The third form is a philosophic code as advocated by Bentham, the adoption of a purely ideal system of laws founded on reason and natural justice. This, however, is not feasible for no people are likely to abandon the reasonably good body of law evolved in their country for the scheme of a philosopher however excellent. No code of the English law or any of its branches has been of the third class.

Ilbert in his Legislative Methods and Forms says:—

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> "We know that enacted law is most useful if confined to the statement of general principles, and that the more it descends into details the more likely it is to commit blunders, to hamper action and to cramp development."

In the early stages there was some codification of the English law, such as The Mirror professing to be an abridgement of the English law from King Arthur to Edward I., commended by Lord Coke as more illustrative of our whole legal history for the period from the Anglo-Saxon monarchy to the Great Charter than any other extant. Leges Henrici I. professes to be a Code of the entire kingdom. Hallam attributes them to a compiler in the reign of Stephen; they may have been later. I have already referred to Glanville, Bracton and Fleta.

Over three hundred years ago, Sir Francis Bacon wrote:—

> 'Of the laws of England: I have commended them before for the matter, but surely they ask much amendment for the form; which to reduce and perfect I hold to be one of the greatest doweries that can be conferred upon this Kingdom.'

Lord Westbury said in the House of Lords in 1863:—

> "The wisdom and excellence of Lord Bacon's proposal for the compiling and amendment of the law of England have been admitted from age to age, and the fact that nothing has been done to give effect to it, we must attribute to the singular inertia that characterises the English legislature."

And in 1869, in an address to the Juridical Society. Lord Westbury spoke as follows:—

> "So far as the condition of our law was concerned, we stood completely alone in the civilized world. There was not a nation in Europe which had not made in that respect greater progress. It was the duty of every lawgiver, not only to enact good laws, but to enact them in such a manner that the knowledge of them might be accessible to all. Was the knowledge of our law thus accessible? The people placed abundant confidence in the integrity of its administration and deservedly so. It was that confidence that had preserved our system, for, generally speaking, the unfortunate man who found himself under the necessity of going to law, felt that he was about to commit himself to some horrid unknown region, abounding in snares and pitfalls into which he entered with fear and trembling, and rejoiced if by any chance after years of suffering, he was emancipated from that desert and state of bondage. Why should such a state of things be permitted to continue?"

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Let me state shortly some of the reasons which have been urged in favour of such codification:—

(1) The same persons should not be both lawgivers and judges. The common law grew through the formulating of its principles by judges. To the extent to which they participate in varying the law or developing it for new circumstances, the law becomes uncertain and ex post facto. A proper code would impose some check upon the license of judicial liberty and discretion by creating a fixed body of principles which would be a moral necessity, and a departure from which could be detected and corrected;

(2) The laws of the land are for the people of the land. Those who are to obey them should have some opportunity of knowing them, or, at least, their general principles. The people desire to know their rights and duties that they may assert the one and perform the other. Lack of knowledge of the law and its uncertainty weaken reverence for the law;

(3) Codification would remove technical, obsolete and useless parts, clear up doubtful, and fill up gaps covered by conflicting, decisions, and would be of orderly arrangement and comprehensive without being vague, making simple what is now complex, systematic what is now chaotic;

(4) New rules to meet new conditions can be more easily grafted on a statute or code than on the common law;

(5) The involved condition of our law makes specialization necessary and centralization, a consequence which would be avoided somewhat by code law;

(6) It would to lawyer and judge save time and worry ferreting out the law. The feasibility of a Code has been demonstrated by other countries. Codes have been adopted in modern times by most of the nations of the European continent and recently by Japan, also by some of the United States;

(7) In those countries where the common law prevails, and in Canada, the tendency and quiet movement is toward codification;

(8) It is impossible to over-rate the benefits of bringing the laws of the different provinces into substantial harmony by a codification of the great underlying principles more or less common to all.

One reason and perhaps it is most forcible of all for keeping the codification of the common law continually in view,

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is its influence on the unification of law throughout the Empire. Most of the improvements in the form of the English law are followed up after no long interval by substantially identical legislation in the British Dominions. The Bills of Exchange Act, the Partnership Act, and the Sale of Goods Act, for example, have been adopted largely in British Dominions. The Criminal Code, recommended by the English Commissioners, but not yet adopted by the British Parliament, was enacted by our Federal Parliament. The Bills of Exchange Act has largely influenced the enactment of the Negotiable Instruments law which has now been adopted in nearly all the States and Territories of the American Union.

What Rome did under equally difficult circumstances, what other intelligent and strong nations have done, Canadians can do. This youngest of the nations, heir of all the ages, was not born for a position of insignificance but of greatness. It needs the leadership of our best jurists and lawyers.

In addition to the tendency in the common law provinces toward a form of codification such as prevails in Quebec and leading to a greater similarity of Canadian jurisprudence, there are other influences ceaselessly at work to create a more general and better jurisprudence. The convenience of interprovincial business requires it. Time and the fact that we will be addressed on this subject by another better qualified to speak prevents further statement from me on it.

Let me only say that history shews how fatuous and destructive is any attempt of any considerable body of people to coerce into uniformity with their own, the conflicting ideas and conceptions of the intelligent people of any province, State or nation. The Egyptians failed to force into uniformity with their own the Israelitish nations and conceptions; the Hebrews, though thinking themselves the Chosen People of God and the Gentiles His and their enemies who merited destruction, failed also; so did the Macedonians at Thebes, Germanicus with the Marsi, and Cromwell in Ireland. The Religious Wars of the Middle Ages and the Thirty Years War abound in illustrations of the utter futility and disaster of such attempts. So too will fail the great War Lord of Germany, his military advisers and cohorts, to impose their boasted "kultur," their civilization, their religion of valour upon unwilling nations.

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The Canadian Bar Association has no such passion for uniformity. The powers which make for the development of any country and its unity are peaceable, yet powerful. They are those of mind and heart and conscience combined with energy. The rules which regulate these are the inhering laws of human nature which are as constant as matter and its universal laws. As the people of Canada approximate in these attributes and qualities, and they will, as the demands of business convenience increase, similarity of law will necessarily result. Our common law judges and our legislators have not created law; they have formulated it to express the wish and needs of the people as rules to guide in the changed and ever changing conditions of society. The law of a country is the responsive expression of its social and business life and it must expand with it, or hamper it. The ever advancing and altering relations of society and individuals, new fields of human activities, new modes of thought, increase in knowledge, demand modification of the old rules and the adoption of new. This has been the teaching of history—'the old order changeth giving place to the new.' Custom may shudder at the lack of veneration for the old and at the boldness of young enterprise; grey-bearded use leaning on its staff may wonder where all this is going to end. We sometimes forget the truth that—

> Old decays but foster new creations.
> Bones and ashes feed the golden corn.
> Fresh elixirs wander every moment
> Down the veins through which the live past
> Feeds its child—the live unborn.

These new creations need suitable laws and an adequate jurisprudence. Who can provide it? The conditions are not dissimilar to those of Rome in the days of Justinian when the people looked to the lawyers and jurisconsults to aid them. They did not look in vain. What the lawyers did in the time of Justinian surely we having the advantage of all the past knowledge can do and more. It is significant that those ancient lawyers and jurisconsults often assembled for discussion at the Temple of Apollo and also that the people of Rome selected a house in a frequented street and gave it to one of their great jurisconsults, Scipio Nasica, that he might be ever accessible to them. They gathered knowledge in the secret places of wisdom and gave it to the people among whom they dwelt. So may it be with our splendid profession

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in the advancement of jurisprudence and the improvement of the administration of justice.

None can so aid the Canadian people as the members of our Bar. In the common judgment of the people, the profession of the law, as they call it generally, and its learned and gifted members are held responsible for what is weak, uncertain and wrong in the law or defective in its administration, and justly so in our democracy for on whom else can they depend to advise and pilot them to better things. Let us not then withhold good from those to whom it is due when it is in the power of our hand to do it. Canada has good statesmen and political leaders, but if our skilled lawyers will unite in wisely and energetically carrying out the purposes of the Canadian Bar Association they will confer a benefit upon the country more general and lasting than that of statesmen and politicians.

J. A. M. AIKINS.

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ENGLISH EMERGENCY LEGISLATION.[1]

One of the most remarkable features of the present European war, from the point of view of the English lawyer at any rate, is surely to be found in the almost overwhelming mass of legislation, proclamations, orders in council, and regulations which have sprung into being during the past few months. Such a juridical novelty is also one of interest to lawyers everywhere and particularly for those of countries owing allegiance to the British Crown. Some of the proclamations were made in pursuance of common law powers of the King, while others were made in accordance with the provisions of the various Acts of Parliament passed in consequenec of the great and unprecedented emergency. The various regulations made by Secretaries of State form excellent illustrations of the ever-increasing tendency of modern legislators to confine their energies to the main outlines of a subject, leaving the detailed working out of the rules embodied in the Acts to be done by the various government departments concerned. From the beginning of the fateful first week in August, which turned Europe into an armed camp, until the end of November, something like sixty statutes dealing with matters connected with the position created by the war received the royal assent after being unanimously agreed to by both Houses of Parliament. During the first week of August alone six emergency statutes were passed. Those critics of modern legislative methods who are apt to complain of the length of time required to secure the passage of a Bill through Parliament will no doubt find ample room for reflection in a consideration of the speed with which these "Emergency" statutes were passed, several passing through all the stages from introduction to royal assent in one day. A feature of note—though one which was almost certain to be found in the case of such hasty legislation—is that some of the earlier "Emergency" statutes were shortly afterwards repealed and replaced by others more accurately defining the wrong to be remedied or the measures to be taken to secure the safety of the realm. These sixty statutes alone require a good deal of assimilation even by the professional lawyer, and when we find added to these almost innumerable and constantly changing regulations carrying out their pro-

[1] Written specially for the CANADIAN LAW TIMES.

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visions, it is a matter of small wonder if lawyers are often "hazy" on many of the points covered by these Acts and Regulations, whilst as for the non-professional man, his condition as regards a knowledge of the new rules, governing his life in all its aspects, under which he lives may be considered as hopeless. Indeed, this absence of knowledge does not appear to be confined either to the lawyers or the laymen, for it has been contended that the regulations first issued purporting to carry out the provisions of the first Defence of the Realm Act went far beyond anything authorised by this statute and were, in fact, not legal. Although this defect has been remedied by other and fuller powers given by a later Defence of the Realm Act, it is an example of the confusion caused by so many and various provisions suddenly being thrust upon the English people.

In this present article it is proposed to consider very briefly the nature of this Emergency legislation, although to do this in a short magazine Article will be seen to be almost an impossibility when it is remarked that the various statutes, orders, proclamations and regulations comprised in the general term "Emergency" legislation fill over 700 closely printed pages. In our survey of this legislation, it is proposed to divide the subject into various heads and to classify the Acts of Parliament, etc., as under:—(1) Those relating to the Declaration of War; (2) those relating to the Army and the Navy; (3) those relating to the Defence of the Realm; (4) those relating to Restrictions on Aliens; (5) those relating to Economic Conditions; (6) those relating to Trading with the Enemy; (7) those relating to Contraband of War; (8) those relating to Financing the War; (9) those relating to Prize Courts, and (10) those relating to postponing the operation of various statutes of a highly controversial nature already passed under the provisions of the Parliament Act 1911, and (11) miscellaneous. It should be borne in mind that this classification is for convenience of discussion only, and that probably many persons might cavil at some of the titles used.

1 *The Declaration of War.* Under this head we may put the notifications that a State of War existed with (1) Germany, (2) Austria-Hungary, and (3) Turkey. The proclamations of a state of war with these countries were of course made by the King under his common law powers.

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An Order in Council dated August 4th, 1914, under s. 16 of the Regulation of the Forces Act 1871, declared that the Government should have control of the Railways. By this means the complete control of internal communications was in the hands of the Executive and the conveyance of large masses of troops rendered easier. It will be noticed that the statute empowering the Government to do this was passed over forty years ago.

2. *The Army and the Navy.* The outbreak of war found England with an Army, the rules for the government of which were to be found in the Army Act of 1881, and a Navy governed by other rules. Immediately upon the outbreak of war the King by Royal Proclamation called out the Naval and Military Reserves and embodied the Territorial Force for Home Defence. Orders in Council were made authorising the billeting of soldiers and the requisitioning of certain articles in cases of emergency. Parliament also at once passed Acts dealing with the supply of food for the Army, for remitting death duties in the case of persons killed in action, and various other matters connected with the Royal Forces. Various other proclamations and orders dealt with such matters as soldiers' pensions, separation allowances for soldiers, wives and children, health insurance, and many other points which such unprecedented events rendered necessary of attention. Parliament also sanctioned the increase of the Army to larger dimensions than ever before have been known.

3. *The Defence of the Realm.* As soon as it became evident that Great Britain was involved in a European War, it became necessary that steps should be taken for the defence of the country, and the first step was a Royal proclamation dated August 4th, 1914, reciting that an imminent national danger existed, and calling upon all subjects to obey any orders and instructions made or issued for the purpose of securing the public safety. This proclamation was followed by an Act of Parliament passed on August 8th, giving the King power by Order in Council to make Regulations for the Defence of the Realm. On August 12th Regulations giving effect to this Act were issued. The above mentioned Act was amended by a further Defence of the Realm Act passed on August 28th, and both were repealed by a Consolidating

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Act passed on November 27th, 1914. The Regulations already made under the earlier statutes were revoked and more and more extensive regulations were made by the King in Council on November 28th. These amended regulations which authorise trial by Court martial form a veritable code of life, running to 63 sections. A further amending Act is now (March 10th), before Parliament. Under this head may also be classed the statute (4-5 Geo. 5, ch. 4) dealing with special constables and the regulations, orders in council, etc., with reference to this matter. Large numbers of special constables were sworn in to assist in guarding the country. Probably none of the various orders has brought the war so much home to the majority of the population as those relating to the diminution of lighting in the streets and shops of various towns, and, indeed, in some cases, e.g., coast towns, all outside lights have been extinguished in obedience to such orders.

4. *Restrictions of Aliens.* Parliament passed on August 5th, the Aliens Restriction Act giving power to the King in Council in time of war, or imminent national danger, by Order in Council to impose restrictions on aliens, and in pursuance of these provisions an Order in Council was made on the same day dealing with this matter. This Order after having been amended by three further Orders was ultimately revoked by the Aliens Restriction (Consolidation) Order, 1914, dated September 9th. By these Orders provision is made in many matters relating to aliens among which may be mentioned the following: (1) Ports at which aliens may enter and leave the United Kingdom; (2) restrictions on aliens residing in the United Kingdom,—power being given to a Secretary of State to order aliens to reside in certain areas—a prohibition on aliens from residing in certain named areas without a permit; all aliens resident in the named areas and alien enemies wherever resident to register themselves; no alien enemy to travel more than five miles from his registered address without a permit; (3) no alien enemy to have a firearm, etc., without a permit; (4) no newspaper in the language of a State at war with His Majesty to be circulated among alien enemies without permission of a Secretary of State; (5) Alien enemies not to carry on a banking business without permission. Any person acting in contravention of the provisions of the Orders is liable to a fine of £100 or to

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6 months' imprisonment. By an Order in Council dated October 8th, an alien enemy is forbidden to use any name other than that by which he was known at the commencement of the war.

5. *Economic Conditions*. Doubtless some people will object to the heading of this sub-section, but by it is meant legislation, etc., affecting trade and the financial position of persons within the Realm. From the point of view of the English lawyer, these statutes, etc., form by far the most important part of the Emergency legislation, because he finds it necessary to refer to some of them daily in his practice, whether he be advising a plaintiff as to his rights, or a defendant as to his obligations.

The unprecedented conditions at the beginning of August necessitated many provisions dealing with matters of a financial nature. Proclamations were made appointing three additional Bank Holidays for the days following August Bank holiday, enabling the Government and the Bankers to take steps to deal with the financial situation. On August 6th the Currency and Bank Notes Act, 1914, authorised the Treasury to issue Currency Notes of £1 and 10/- value such notes to be current in the United Kingdom in the same manner as sovereigns and half-sovereigns, and to be legal tender, the holder of such a note to be entitled to payment at the Bank of England of such note at its face value in gold. In addition provision was made making postal orders current and legal tender as fully as coins and to be redeemable at their face value at the Bank of England. By a recent proclamation this provision as to postal orders has been revoked under the provisions of sec. 1, sub-sec. 6, of the Act.

A Proclamation dated Sunday, August 2nd, after reciting the financial difficulties caused by the European situation provided for the postponement of the payment of certain Bills of Exchange. This Proclamation was specifically confirmed by the Postponement of Payments Act, 1914, passed on August 31st, 1914, the short effect of which is to pretween August 6th and September 30th. The effect was to postpone the payment for specified times of bills of exchange, and other negotiable instruments and payments due in pursuance of other contracts.

From the point of view of the practitioner the most important of the "Economic" Emergency Statutes now in force

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is probably the Courts (Emergency Powers) Act 1914, passed on August 31st, 1914, the short effect of which is to prevent any person proceeding to enforce the payment of any money (by distress, execution, or otherwise) due under a contract made before the 4th day of August unless such person has previously obtained the leave of the Court. On the application for leave to proceed it is open to the defendant to shew that by reason of circumstances attributable to the present war he is unable to fulfil his obligations.

6. *Trading with the Enemy.* On August 5th a Royal Proclamation prohibited trading with inhabitants of Germany. This prohibition was extended to Austria-Hungary on August 12th, and on September 9th, these proclamations were restated and extended in their operation. The Trading with the Enemy Act 1914, imposed penalties on persons trading with the Enemy in Contravention of the law, making provisions for inspection of books and documents. This Act was amended by the Trading with the Enemy Amendment Act 1914, which made provision (1) for the constitution of the office of custodian of enemy property (the public Trustee being the person appointed for England and Wales); (2) as to payment of dividends payable to the enemy; (3) as to the invalidity of assignment of debts by enemies or transfers of shares by them.

7. *Contraband of War.* By an Order in Council dated August 20th the provisions of the maritime Convention known as the Declaration of London were adopted with various modifications and additions, and by a further Order in Council dated October 29th, the said Order in Council was re-enacted with further amendments so as "to minimise so far as possible the interference with innocent neutral trade." These Orders directed that for the articles of Absolute and Conditional Contraband contained in Articles 22 and 24 of the Declaration, were to be substituted the lists of Absolute and Conditional Contraband contained in the Royal Proclamations of August 4th. It was further provided that all Prize Courts should construe the Declaration of London by the light of the Commentary on the Declaration forming the General Report of the Drafting Committee. By a Royal Proclamation dated October 29th, the lists of Contraband contained in the earlier proclamations were revised with various additions.

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8. *Financing the War.* By the Finance Act, 1914 (passed on November 27th, 1914), the duty on tea and beer was increased, the duty on retailers' on-licence where the hours of sale are curtailed was reduced. Income Tax and Super Tax were increased, provisions as to the war loan were made, and various other provisions in respect of the financing of the war were made. On November 17th the London Gazette contained a prospectus of the New War Loan of £350,000,000 to be issued at £95, bearing interest at 3½ per cent.

9. *Prize Courts.* So many years having elapsed since a Prize Court had sat in England, it at once became evident that new Rules of Procedure on this subject were necessary. Accordingly, under the provisions of the Prize Courts Act 1894 (subject to the provisions of the Naval Prize Act 1864) the King by Order in Council dated August 5th, 1914, prescribed the Rules to be observed in Prize proceedings. These Rules form a complete code of Prize Procedure running to nearly a hundred closely printed pages. These rules were subsequently amended in slight respects by further Orders in Council. Here again we notice that such Rules were made under the provisions of already existing statutes.

10. *Postponing the Operation of Contentious Measures.* By the Statute 4-5 Geo. 5, c. 88 (the Suspensory Act, 1914), provision was made that the Government of Ireland Act, 1914, and the Welsh Church Act, 1914, should not be put into operation until 12 months after the date of their having been passed or (if at the end of such 12 months the war has not ended until) the end of the war. It was considered that these measures which had been so fruitful of controversy during their passage through Parliament and which had been rejected by the House of Lords in three sessions, finally being passed under the provisions of the Parliament Act 1911, should not come into force whilst so many other matters were engaging the attention of the country.

11. *Miscellaneous.* Under this head we may place such documents as the Admiralty notice prohibiting the use of wireless telegraphy by merchant vessels, the Order forbidding aerial navigation in the United Kingdom, Orders as to detention of German ships, Patents, Designs and Trade Marks (Temporary Rules) Act, the Unreasonable Withhold-

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ing of Food Supplies Act, Temporary Rules as to Patents and Trade Marks, Intoxicating Liquor (Temporary Restriction) Act, and numerous other Acts, Proclamations and Orders.

One last point is worthy of note and that is as to the duration of the Acts. The large majority of the Emergency Statutes are confined to their operation either during the continuance of the present war or else for a stated period. For example, the Postponement of Payments Act was to remain in force for 6 months from August 3rd, the Defence of the Realm Act is to remain in force during the war only, as is the Trading with the Enemy Act; the Courts (Emergency Powers) Act is to remain in force for 6 months after the war? The Aliens Restriction Act, the Currency and Bank Notes Act, and others are not restricted to any time.

W. E. WILKINSON.

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London.

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UNIFORMITY OF LAWS IN CANADA.[1]

In the minds of many Quebec lawyers the mere title of my subject will arouse antagonism and alarm. In 1663 Louis XIV. cancelled the charter of the One Hundred Associates and introduced into this country the laws of his realm, and from that date until the present time the civil laws of France have been in force, except during the brief interval between Governor Murray's proclamation in 1763 and the Quebec Act of 1774. The last mentioned statute recognized that the provisions of the proclamation, including the introduction of the laws of England into the colony, were inapplicable to the state and circumstances of the province, whose inhabitants had enjoyed a system of laws by which their persons and property had been protected, governed, and ordered for a long series of years from the first establishment of the province, and in consequence restored the old laws of Canada. Throughout all the subsequent constitutional changes this system has been maintained, and section 94 of the Confederation Act of 1867 in providing that the Parliament of Canada may make provision for the uniformity of laws relative to property and civil rights in the other provinces of Canada (with the concurrence of their respective legislatures) omits Quebec from the enumeration of provinces affected by this section.

No wonder, then, that the Bar of this province should look with suspicion upon any project which may seem to have for its aim the submergence of the civil code in the rising tide of the common law around its borders.

Let me at once dispel all such apprehensions by saying that the movement in favour of uniformity which took its rise in the great Republic to the south of us does not contemplate any constitutional changes or the impairment of provincial autonomy. Mr. Terry, the president of the Commissioners on Uniform State Laws, in his admirable address delivered at Washington in October last, said:—

> "We are not advocating centralization of Government. We are not advising the obliteration of States lines. On the contrary, we would deprecate the former and warn against the latter. Our faith in the dual sovereignty,

[1] This Address was read before the Canadian Bar Association at its meeting in Montreal, on March 19th last.

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and the nice checks and balances of our system of government has grown in these latter days as the assaults upon it from both friends and foes have disclosed at once their own futility and the inherent soundness of the object of their attack."

And so in our own case no one to-day advocates the establishment of legislative union, which some of the Fathers of Confederation would have preferred to the present division of legislative powers. Besides, legislative union does not necessarily mean uniformity of laws. You have a familiar example in the case of the British Parliament which preserves the common law for the English and the civil law for the Scots. We ourselves tried the experiment from 1841 to 1867 when we had a common parliament for Upper and Lower Canada which dealt out English law to one province and French law to the other. Even the Autocrat of all the Russias maintains German law in the Baltic provinces, French law in Russian Poland, and Swedish law in Finland. Nor does the project which is submitted to your consideration aim at the fusion of the two great systems of law which prevail in Canada. It is not that the task in itself is an impossible one. France and Germany have, indeed, achieved success in this direction under conditions even more complicated than our own. In France the Roman law prevailed in the south, while Teutonic customary law prevailed in the north.

And there were sixty general or provincial customs, and three hundred local customs governing civil rights in cities, towns and villages. Such was the chaos of jurisprudence which the framers of the Code Napoleon were called upon to harmonize. In Germany there were four great systems of different origin, and an infinity of local customs which sometimes differed in the same town according to the side of the street on which you lived. However discredited things "made in Germany" may be to-day, there can only be one opinion as to the wonderful achievement of the jurisconsults who out of this welter of diversity constructed the German Civil Code.

But however successful the great unitary systems may have proved to be in welding together and strengthening the nations which have adopted them, our choice has been made in favour of less centralization and more local autonomy.

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Recognizing the definitive character of this choice, the constitution of the Canadian Bar Association, in the enumeration of its objects, sets forth that one of them is to "promote the administration of justice and uniformity of legislation throughout Canada *so far as consistent with the preservation of the basic systems of law in the respective provinces.*"

Our programme, in fact, is identical with that of the American Bar Association which about a quarter of a century ago started the movement for unification in the United States. There, as you know, the antagonism which began in the time of Hamilton and Jefferson between Federalists and States Righters has been far more acute than our own controversies with respect to Dominion and provicial powers, and the American Constitution confers far less powers on the central Government than the British North America Act does on the Dominion Parliament. But notwithstanding this handicap a large field for useful work has been found and a remarkable achievement has been recorded. A glance at the history of this movement may set us thinking as to the applicability of the methods employed to our own conditions, and suggest the extent to which we may follow along those lines.

The efforts of the American Bar Association resulted in the creation of a commission on Uniform State Laws. This organization consists of commissioners appointed by the Governors of the different States, territories, and possessions of the United States for the purpose of drafting and recommending for adoption by the various legislatures, forms of bills or measures to make uniform the laws of the different jurisdictions on which uniformity seems practicable and desirable. In every State of the Union (48), in every territory and possession, including the District of Columbia, Alaska, Hawaii, the Philippine Islands and Porto Rico, commissioners have been appointed, and twenty-four annual conferences have been held since 1892. From the report of the conference held last year it appears that the Negotiable Instruments Act, adopted by the conference of 1896, is now the law in forty-seven states, territories, and possessions; the Warehouse Receipts Act is in force in thirty-one; the Sales Act in eleven: the Bills of Lading Act in twelve; the Stock Transfer Act in nine; the Act Relating to Wills executed without the State in ten; and the Family Desertion Act in eight.

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Reports have been presented on the Uniform Incorporation Act, the Unification of Commercial Law, the Uniform Partnership Act, Wills, Descent and Distribution, Insurance, Workmen's Compensation Act, Situs of Real and Personal Estate for purposes of Taxation, Automobile Legislation, Uniformity of Judicial Decisions, and on various other important subjects.

It is worthy of note that the State of Louisiana which, like the Province of Quebec, is governed by the civil law, has participated in the movement for uniformity and has up to this date passed seven out of the nine measures presented to its legislature for adoption.

Such are the results of an undertaking which was at first regarded by many of the profession with skepticism or indifference. The pioneers who devoted their time and energy to this disinterested and patriotic endeavour are now reaping their reward, for their educative campaign of twenty years has secured them the sympathy and active co-operation not only of statesmen and lawyers throughout the country but also of the commercial and industrial community.

It will be interesting to you to hear that the mere publication of our own programme in this country has already aroused an interest among merchants and manufacturers, and that our President has recently received letters of encouragement and offers of assistance from representative bodies.

Let us now consider the subjects upon which it would be desirable and practicable to aim at greater unity without disturbing any fundamental principles in the basic systems of the several provinces of Canada, and without trenching in the least degree on treaty rights and historic traditions.

In no field of jurisprudence will greater unanimity be found to exist in favour of more uniformity than in that of commercial law. There are really no obstacles in our way for the principles of the "law merchant" are much the same all over the world, and even in countries where ordinary contracts are governed by the civil law, mercantile relations are frequently regulated by a commercial code based on international usage. Moreover, in Canada a very important part of this field is under the control of the Dominion Parliament, and we have Federal codes on Bills of Exchange and Promissory Notes, Banks and Banking, Savings Banks, Navigation and Shipping, Patents and Copyrights, Currency and

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Coinage. The Canadian Parliament has also exclusive legislative jurisdiction over Bankruptcy and Insolvency.

As to the portions of mercantile law not committed to the legislative action of the central parliament, there can be no difficulty in harmonizing the law of all the provinces whose systems are derived from the law of England. And even as to Quebec the differences in the law on this subject are negligible. The codifying commissioners in their report on the fourth book of the Code dealing with Commercial Laws state that our system has been borrowed without much discrimination partly from France and partly from England, and that the laws of commerce are of universal application and for the most part differ little in different countries except in matters of detail. Again, the law of evidence in commercial cases is of English origin, and our Code provides (C. C. 1206), that, except in the rare cases where special provisions are contained therein for the proof of facts concerning commercial matters, recourse must be had to the rules of evidence laid down by the laws of England.

It is unnecessary to state that our merchants and manufacturers, from Halifax to Vancouver, would welcome as an inestimable boon the unification of our commercial laws.

No one realizes as keenly as they do that diversity and multiplicity of laws in a great commercial community means a fixed charge on any business for legal advice and litigation, and a corresponding diminution of profits. Really, the only people who might be supposed to object to a simplification of the law are the lawyers themselves, who might be driven out of business. But while it seems to be regarded as axiomatic that our manufacturers need protective legislation, I have never heard it contended that the activities of the legal profession require any artificial stimulation.

What could be more beneficial to the business community than a uniform statutory code on Commercial Sales? No difficulty has been found in applying the 'Sales of Goods Act' to England and Scotland, and we have seen that the 'Sales Act' has already been adopted in eleven jurisdictions in the United States.

The law of Insurance in Canada presents an example of wasteful and unnecessary discordance. Every province has an insurance law of its own, for the most part in the form of

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a statutory code, and while these systems are not differentiated by any fundamental principles, they abound in minor diversities calculated to produce conflicts and uncertainty. For instance, the statutory conditions prescribed for insurance policies vary in the several provinces, so that a great transcontinental railway is unable to get a uniform cover on its rolling stock throughout Canada, but must submit to a modification of its contract every time it crosses a provincial boundary line. The matter is further complicated by the fact that a Dominion Insurance law is superadded to the various provincial enactments, and the companies must satisfy the requirements of nine or ten insurance departments before they can do business throughout Canada.

Further confusion is created by the fact that certain portions of the Dominion Insurance Act have been held to be unconstitutional, and the matter is still pending before the Privy Council. How much better it would be for insurers and insured if we could standardize the policy conditions and have a uniform Insurance Act adopted by all our legislatures.

Our Company law is in an equally unsatisfactory condition. There are nine different kinds of provincial laws governing joint stock companies, and a Federal law in addition. The provinces are given the power of incorporating companies 'with provincial objects,' and the Dominion incorporates those whose objects are not so restricted. We have been litigating for years in order to ascertain the scope and meaning of these restrictive words, with the result that a great diversity of judicial opinion has been expressed, and that this question is also awaiting the decision of the Judicial Committee. Whatever the answer may be, it will not abolish the needless contrariety of these ten different systems, nor give our company law the simplicity, certainty and uniformity which is so desirable if we intend to go on floating our securities abroad. In the address to which I have already referred, Mr. Terry informs us that in the United States the sentiment is unanimous in favour of a Uniform Incorporation Act which will bring about "corporate regeneration" and do away with "the fierce competition of various States to secure, at any cost of State dignity, and at any sacrifice of the duty to observe State comity, the revenues which result from offering in the corporate market a maximum of powers with a minimum of responsibility." I am afraid that

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some of our Canadian corporations have likewise been conceived in iniquity and born in sin, and that they too require to be born again under a new and uniform system in order to become innocuous. This is especially true in the case of corporations obtaining special and exorbitant powers from the legislatures. This evil would probably be lessened, and the legislatures would doubtless be more discriminating, if a uniform law of incorporation were adopted throughout Canada.

Our provincial taxing statutes furnish a conspicuous instance of overlapping and conflicting legislation resulting in manifest injustice. As you know, the local legislatures have the power of imposing 'direct taxation within the province.' Whether you determine what is within the province by reference to the domicile of the owner or to the local situation of the property, it seems clear that the British North America Act did not intend that the same property should at one and the same time be regarded as being within the Province of Quebec and within the Province of Ontario. One or other of the rules as to situs must be adopted, but both should not prevail so as to expose the tax payer to double taxation. And yet the ingenuity of the Treasury Draughtsmen in all the provinces is exercised in reaching out beyond the jurisdiction. Take, for instance the Ontario Amendment to the Corporations Tax Act, 1914. It purports to impose a tax calculated upon the gross premiums received by insurance companies in respect of the business transacted in Ontario, and then proceeds to enact that a premium is deemed to be in respect of business in Ontario if it is payable or if it happens to be paid in Ontario or if it is payable in respect of insurance of a person or property resident or situate in Ontario at the time of payment, even where the business is transacted wholly outside of Ontario. Inasmuch as Quebec also imposes a tax on gross premiums, these companies are inevitably exposed to double taxation on the same business. Again, take an example from Quebec. The Succession Duties Acts, 1914, tax property actually situated within the province even where the transmission takes place outside of the Province, and also tax the transmission in the Province of property situated outside. Similar provisions in the Ontario Act bring about the inequitable result that the same property is twice taxed for succession duty.

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The law of Wills offers great opportunities for improvement. It should be easy to standardize all matters relating to their formal validity, so as not to defeat the clearly expressed intentions of testators. For instance, why should a holograph will validly made according to the laws of Quebec be inoperative as to real estate situated in the other provinces (*Ross* v. *Ross*, 25 S. C. R. 307)? Why should the rules governing the revocation of wills be different in different provinces, so that a person making his will when domiciled in one jurisdiction unwittingly revokes his will by becoming domiciled in another jurisdiction and marrying therein, although no such revocation would have taken place according to the law of the original domicile (*Seifert* v. *Seifert*, 7 O. W. N. 440)? Again, there is urgent need for the adoption of uniform rules for the distribution of estates when the property, both moveable and immoveable, is situated in different jurisdictions. In no province is the machinery adequate for such purposes; on the contrary, there seems to be an almost total absence of such ancillary provisions as an enlightened spirit of comity between provinces would suggest, in order to facilitate the prompt and inexpensive distribution of the estates of decedents.

Equally objectionable is the diversity in the rules governing the authority and effect in one of the provinces of judgments rendered in another. In order to facilitate the adoption of uniform rules on this subject it may be advisable in the first place to render uniform the rules of procedure relating to the assumption of jurisdiction by the Courts of the different provinces, so that there may be as little overlapping and competition as possible.

Even when we are legislating upon new questions of general interest which transcend the bounds of the province and which have no foundations in the past, we work in isolation instead of in concert. The Workmen's Compensation Acts are not based on the existing law of torts in the several provinces, but, on the contrary involve, a distinct departure from traditional principles. They embody a new theory which recognizes the inadequacy of the ordinary legal principles of responsibility, and which substitutes therefor the view that risks incidental to a business should be a charge on that business. This was pre-eminently a case for co-operative effort in order to produce uniformity of treatment

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throughout the whole Dominion, instead of allowing separate provincial commissions to create diversity and conflict where none previously existed. As a result we have confusion, uncertainty and contrariety, where it would have been humane to make the law simple, sure and uniform, and to produce a measure that would not have compelled the unfortunate victim to go through two or three Courts before ascertaining what his rights are.

Not only does the substantive law invite the efforts of the reformer, but also the law of procedure. Many a suitor is deterred from pressing his claim in a sister province by the unfamiliar terms and methods employed in another forum than his own. Here, at least, we should not be hampered by the traditions of the past, for archaic forms and practices are survivals of a period when the rights of the litigants were too often lost sight of in the intricacies of procedure. Procedure should be the obedient handmaiden and not the arrogant mistress of substantive law. Some of our provinces have made greater strides than others in their emancipation from rigid and technical forms of practice, and nothing but good would result from an attempt to assimilate the different systems.

The subjects which I have selected for your consideration do not by any means exhaust the list of those which might be suggested. They are merely given by way of illustration, and my purpose has been attained if I have succeeded in convincing you of the possibility and desirability of nationalizing our jurisprudence.

You will not fail to bear in mind that the method suggested for realizing this object has nothing compulsory about it. It is founded upon the firm belief that persuasion is more potent than force in welding together communities. Much as we resent being dragooned into uniformity, we can hardly be so unreasonable as to refuse to give an attentive and sympathetic hearing to those who think that there is a great deal of good that we can learn from one another—much to borrow from every system and a great deal to discard in all.

It has indeed been contended by some writers that variety is desirable in a Confederation, because it enables the component States to indulge in experiments which may prove instructive and useful to the whole country. The experience

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of the American Commonwealth is that in the field of law there has been too much experimentation at the expense of the litigant, and that so far from tending to the selection of the fittest among the tentative projects, the result has been to intensify defects and perpetuate unnecessary differences. The same problem faces us in Canada. Shall we by remaining in jealous isolation encourage the aimless and inevitable differentiation of our legal systems, or shall we not rather, in so far as our special circumstances will permit, fall into line with the movement in all great nations towards the goal which a great Belgian jurist called "the universality of the law."

E. LAFLEUR.

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MUNICIPAL CRIMINAL LAW.[1]

The Municipal Act, R. S. O. (1914), ch. 192, purports to confer upon municipalities the power to enact certain penal by-laws, and in pursuance thereof nearly every municipality in the province has passed a code of by-laws, a number of which I contend are *ultra vires*.

Section 399 (8), (40), of the above Act provides that municipalities may pass by-laws,

"(8) For suppressing disorderly houses and houses of ill-fame."

"(40) For suppressing gambling houses, and for seizing and destroying faro-bank, rouge et noir, or roulette tables, and other devices for gambling found in them."

In 1849 sub-section (8) read, "For suppressing and imposing penalties on the keepers of low tippling houses and houses of ill-fame visited by dissolute and disorderly characters," and sub-section (40) is taken from the Act of 1858, 22 Vict. ch. 99, sec. 275 (8). These sub-sections were *intra vires* at the time when they were first passed, but clearly they are now *ultra vires*, for the offences are covered by the Criminal Code secs. 225 to 239 inclusive, and being offences against the general Criminal law they cannot be made offences against a Provincial Act, nor a Municipal By-law, passed under the authority of such an Act. To hold otherwise would be to render the offender liable to be punished twice for the same offence, contrary to Criminal Code sec. 15.

In *R.* v. *Shaw*,[1] Killam, J., quashed a conviction for unlawfully keeping a gambling house in Winnipeg, contrary to a municipal by-law passed under Manitoba Act 53 Vict. c. 51, s. 375 (39b), the language of which is the same as sub-section 40, holding that since the keeping of a common gamb-

[1] We are glad to afford Mr. Lear an opportunity of expressing his views upon a point upon which there is, perhaps, still some ambiguity. At the same time we must respectfully dissent from his conclusions. If the Dominion criminal law covers a certain class of conduct, no doubt provincial legislation cannot detract from the application or operation of such Dominion enactments in any way. But it does not, we submit, follow that provincial legislatures cannot prohibit,—or authorise municipal Councils to prohibit—the like conduct by way of by-laws suggested by the special circumstances of particular localities, or municipalities, in order to promote the peace, order and welfare of the public, and the intellectual and moral interests of the inhabitants. We may, perhaps, be allowed to refer to Canada's Federal System, pp. 329-330: 582-604.—EDITOR C. L. T.

[1] (1891) 7 Man. R. 519.

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ling house was an indictable offence at common law, the provisions of the Municipal Act empowering municipal councils to pass by-laws for suppressing gambling houses must be held to be *ultra vires, "the criminal law"* being one of the subjects in respect of which the Parliament of Canada has exclusive jurisdiction. This decision was affirmed by the full Court.

Per Taylor, C.J., "In my opinion the keeping of a gambling house, being an offence against the general criminal law to be dealt with by the Parliament of Canada, cannot be made an offence against a provincial law or by a municipal by-law passed under the authority of such an Act. To hold otherwise would seem to render the defendant liable to be punished twice for the same offence, contrary to all principles of law."

The headnote to *R.* v. *Matheson*,[2] states that a conviction could have been made under a municipal by-law passed under authority of sub-section 40. This headnote is misleading; Wilson, C.J., did not decide what the headnote states. His lordship only made a passing observation that there was a provision in the Municipal Act permitting the passing of by-laws against gambling, and stated that he believed that there was such a by-law in force under which the defendant might have been prosecuted. These remarks were wholly unnecessary for the decision of the case and are therefore merely *obiter dicta*. Had the defendant been convicted under such a by-law and the validity of the by-law argued before their lordships there is no reason why they would not have arrived at the same result as *R.* v. *Shaw*.

However the Court of Queen's Bench for Quebec decided that although the Parliament of Canada has exclusive jurisdiction over "the Criminal law" yet a provincial legislature may authorize municipal corporations to pass by-laws for the suppression of nuisances: *Pillow* v. *Recorder's Court*.[3] Granting that the reasoning in this case is correct and that provincial legislatures have such jurisdiction, still these by-laws can be of no effect, because the Privy Council has decided that where a field of legislation is within the competence of both the Dominion parliament and a provincial legislature, and both have legislated, in case of conflict, the

[2] (1884) 4 O. R. 559.
[3] (1885) 30 L. C. J. 1.

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enactment of the Dominion parliament must prevail: *St. Francois* v. *Continental Heat & Light Co.*[4]

This Quebec case must be considered to have been overruled by the Privy Council for their Lordships decided that it was Criminal law in its widest sense that is reserved by B. N. A. Act, (1867) s. 91 (27) for the exclusive legislative authority of the Parliament of Canada: *Atty.-Gen. for Ont.* v. *Hamilton St. R. W. Co.*[5] In the light of this decision, all Provincial Acts and Municipal By-laws, which in any way trespass upon this "*exclusive legislative authority,*" must be *ultra vires.*

Section 400 (2) provides,

"(2) For prohibiting common begging or persons from importuning, in the highways or public places, others for help or for aid in money, and deformed, malformed or diseased persons from exposing themselves, or being exposed there, to excite sympathy or for the purpose of obtaining help or assistance."

Section 399 (65) provides,

"(65) For restraining and punishing vagrants, mendicants, and persons found drunk and disorderly in any highway or public place."

Section 406 (3) provides,

"(3) For providing that the chief constable or any member of the police force in charge of a police station to which a person is brought charged with being *drunk without being disorderly* may release him without bringing him before a justice of the police or police magistrate."

These three sub-sections are purely Criminal law and are covered by sections 238, 239 of the Code.

Sub-section (65) is taken from the Act of 1858, 22 Vict. ch. 99, s. 275 (9), and was *intra vires* when passed.

Sub-section (3) was first passed in 1892, by 55 Vict. ch. 43, s. 34. There never was any sense or reason for passing it, because being *drunk without being disorderly* is not an offence at all. See *Ex p. Despatie.*[6] If any person is taken into custody without having committed an offence he is entitled, as a matter of right, to be released and any by-law authorizing his release is useless.

Section 399 (49) provides,

"(49) For prohibiting the production or giving of an immoral or indecent play or performance in any theatre, hall or other public place of amusement or entertainment, and for authorizing the chief constable, the deputy chief constable or any inspector of police, or any officer or person specially detailed for that purpose, to enter any theatre, hall or other place of public amusement or entertainment, and if at his request such play or performance is not forthwith stopped, to apprehend the performers without warrant, and to take them as soon as practicable before a police magistrate or a justice of the peace."

[4] C. R. [1909] A. C. 49.
[5] [1903] A. C. 524.
[6] (1886), 9 Legal News 387.

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This sub-section is covered by Criminal Code s. 208.

A provincial legislature has jurisdiction to legislate concerning matters of police regulation of public morals, and the power of enacting such police regulations may be delegated by the provincial legislature to municipal councils, but if the same subject has been dealt with by the Dominion Parliament then the Dominion legislation must prevail: *St. Francois* v. *Continental Heat & Light Co.*[7]

It is my humble opinion that the only authority possessed by a provincial legislature in this respect is strictly in matters of *police regulation,* viz., methods and means of enforcing the law. I think that the provincial legislatures have no authority to pass any criminal law whatsoever.

Section 399 (48) provides,

"(48) For prohibiting the posting or exhibition of placards, play-bills, posters, writings or pictures or the writing of words, or the making of pictures or drawings, which are indecent or may tend to corrupt or demoralize, on any wall or fence or elsewhere on a highway or in a public place."

This sub-section is taken from the Act of 1858, 22 Vict. ch. 99, s. 275 (3) and was then *intra vires,* but not since 1867. It is now covered by Criminal Code ss. 205, 207, 208, 209 and 238 (c), (h).

In *McLellan* v. *McKinnon,*[8] it appeared that the plaintiff had been convicted under a village by-law for posting up indecent placards in public places in the village.

Cameron, J., in giving judgment said:—

"The by-law is that no person shall post any indecent placards . . . on walls or fences or public places making a more extensive prohibition than the words of the Act would sanction. Under the by-law the posting of an indecent picture or placard in a public hall, though not on a public street, would be an offence, whereas under the Act, no authority is given to prevent the posting of an indecent picture or placard except on a wall or fence *in a street or public place.* . . .

"There is no doubt that the placard which the plaintiff was convicted of posting was a criminal libel. *It is a grave question . . . whether a municipality has power to make a new offence, and award a new punishment or add an additional one to that which is a criminal offence, and may be punished as such under the criminal law.*"

[7] C. R. [1909] A. C. 49.
[8] (1882), 1 O. R. 219.

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In *R.* v. *Greaves*, 6th May, 1889, Judge Wurtele maintained a *certiorari* against a conviction for having illegally exhibited in a show case in a house situated in a public street, an indecent picture, representing a nude woman, of a nature to offend the modesty and corrupt the morals of the public to whom this picture was exposed, contrary to a by-law of the City of Montreal.

Judge Wurtele's judgment in part was as follows:—

"Considering that such offence is punishable by summary conviction subject to appeal; considering that this offence falls under the provisions of the criminal law above cited; (*s. 238 (c) of the Criminal Code*), considering that the City of Montreal has not the right to legislate in matters declared by Parliament to be a misdemeanour. The Court considers the conviction of the Recorder illegal."

Section 399 (66) provides,

"(66) For preventing vice, drunkenness, profane swearing, indecent, obscene, blasphemous, or grossly insulting language, and other immorality and indecency, and the indecent public exposure of the person."

Taken from 33 Vict. ch. 26, s. 4, which was passed in 1869 and consequently never was *intra vires* of the Legislature of Ontario.

Drunkenness and *swearing* are covered by Criminal Code s. 238 (f), *insulting language* is covered by sub-section (e), and *indecent public exposure of the person* is covered by s. 205. *Preventing vice, and other immorality and indecency* is too general to constitute an offence unless particularly specified.

Section 399 (1) provides,

"(1) For prohibiting or regulating the bathing or washing of the person in any *public water* in or *near the municipality*."

Taken from the Act of 1858, 22 Vict. ch. 99, s. 287 (19) and was then *intra vires*, but not now.

"*Near the municipality*" means outside the municipality, and a municipality has no jurisdiction beyond its own boundaries.

It is no offence to bathe in "*public water*," the offence is bathing in *public places*, whether the water is *public* or *private* and the only offence about bathing is the indecent exposure, which is covered by the Criminal Code s. 205.

Section 399 (42) provides,

"(42) For prohibiting the violation of cemeteries, graves, tombs, tombstones or vaults where the dead are interred."

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Even if the above sub-section is *intra vires,* there is no good to be served by any municipality passing such a by-law, because such offences are partly covered by Criminal Code s. 237 and *The Cemetery Act,* R. S. O. (1914) ch. 261, s. 34, fully covers any legislative authority possessed by the Province. A person should not be liable to be prosecuted twice for the same offence. Criminal Code s. 15.

Section 399 (7) provides,

"(7) For preventing cruelty to animals and the destruction of birds."

Cruelty to animals is covered by Criminal Code s. 542, and the destruction of birds is covered by *the Ontario Game and Fisheries Act* R. S. O. (1914) ch. 262.

Section 400 (48) provides,

"(48) For prohibiting the giving, selling or distributing of or the dealing with trading stamps, coupons or other similar devices by any person engaged in trade or business or the receiving of them.

(a) The by-law shall not apply to a merchant or manufacturer who places in or upon packages of goods, or delivers to purchasers of goods sold or manufactured by him at the time of the purchase, tickets or coupons, which state upon their face the place of delivery thereof, and the cash or merchantable value of them, and are redeemable at any time, but only by the merchant or manufacturer giving them and at the place where such goods were sold or purchased."

Criminal Code s. 335 (u) defines trading stamps. Section 335 (g) makes the Code apply to companies and partnerships as well as persons. The offence is dealt with in ss. 505 to 508 inclusive.

Why does the provincial legislature presume to confer jurisdiction upon municipalities to pass by-laws which are *ultra vires?* The answer is easy. Before 1867 the Parliament of Upper Canada had jurisdiction to pass such an Act, and by-laws passed thereunder were *intra vires,* but when Upper Canada became the Province of Ontario, this jurisdiction was transferred to the Parliament of Canada. Since then these sub-sections have been amended and re-enacted from time to time, until they have reached their present form, but all these amendments and re-enactments since 1867 are *ultra vires,* and should be omitted from the R. S. O. However they only show with what care our Statutes are revised.

WALTER E. LEAR.

April 28th, 1915.

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CURRENT COMMENTARY UPON ENGLISH AND CANADIAN DECISIONS.

ENGLISH DECISIONS.[1]

Rights under contract for sale of land before conveyance executed.—The first case in the Law Journal reports for March is a decision of the Judicial Committee upon the effect of a certain section of the British Columbia Land Registry Act, 1906, which is not to be found in our Ontario Land Titles Act, to the effect that an unregistered instrument affecting land shall not be receivable as evidence or proof of the title of any person to such land, as against the registered title of any person to the same land, except in an action questioning the registered title to such land on the ground of fraud. The case, however, (*Howard* v. *Miller*)[1] is of general interest for two reasons. In the first place by virtue of that passage in their lordships' judgment where they say: "It is sometimes said that under a contract for the sale of an interest in land, the vendor becomes a trustee for the purchaser of the interest contracted to be sold subject to a lien for the purchase money; but, however useful such a statement may be as illustrating a general principle of equity, it is only true if and so far as a Court of Equity would under all the circumstances of the case grant specific performance of the contract. The interest conferred by the agreement in question was an interest commensurate with the relief which equity would give by way of specific performance." In the second place the judgment illustrates the discretionary nature of a decree for specific performance, their lordships holding that although by virtue of the section of the British Columbia Act, an unregistered deed was not admissible in evidence to disprove the plaintiff's registered title,

[1] It will be noticed that in our monthly Current Commentary the LAW JOURNAL REPORTS are resorted to primarily. The excellence of these Reports has received many tributes in high places. They have the advantage of including all the cases for the month in a single volume. Cases are reported promptly; and the judgments are, we are informed, revised by the Judges, just as they are in the case of the so-called "regular Law Reports." As a matter of fact the Master of the Rolls stated (Ti. L. R., May 21st, 1887):—"All reports made by gentlemen of the Bar, and published on their own responsibility are equally regular. There is no superiority in the reports of the council of Law Reporting." The subscription price is exactly half that of the LAW REPORTS.—EDITOR C. L. T.

[1] 84 L. J. P. C. 49, [1915] A. C. 318.

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yet, the action being one for specific performance of the contract, the unregistered deed was a material circumstance which the Court must take into account in deciding the extent to which specific performance ought to be granted, and was, as such, admissible. The plaintiff's registered title was as purchaser under the contract sought to be enforced; in other words, he was registered only in respect of an interest commensurate with the relief which equity would decree by way of specific performance of that contract. The unregistered deed, therefore, was not needed or adduced to dispute the plaintiff's registered title, but only as a material circumstance in defining the extent of it.

Appeal to Supreme Court after reference to fix damages. —*Windsor, Essex and Lake Shore Rapid R. W.* v. *Nelles*,[2] is a decision of the Judicial Committee which is worth noticing chiefly to illustrate the change made in the Supreme Court Act by 3-4 Geo. V. ch. 51, sec. 1, D. since the question in that case arose. That question was,—or rather during the greater part of the proceedings below had been assumed to be,—whether, where a judgment had been given for the plaintiff, and a reference made to fix damages, an appeal to the Supreme Court would lies on the whole matter after the amount of damages was finally ascertained. It was held by the Supreme Court, in accordance with certain previous decisions of that Court, that an appeal would not lie, because a judgment containing a reference to ascertain damages is not a 'final judgment' within the meaning of sec. 37 of the Supreme Court Act. The Court held that an appeal would lie from a judgment of the provincial Court of Appeal affirming the judgment on further directions which had been made after ascertainment of the damages, but that the merits of the original judgment at the trial which had directed the reference could not be gone into on such an appeal. Now, however, 3-4 Geo. V. ch. 51, sec. 1D, enacts that—'Save as regards appeals from the province of Quebec, "final judgment" means any judgment, rule, order, or decision which determines in whole or in part *any substantive* right of any of the parties in controversy in any action, suit, cause, matter or other judicial proceeding.'

[2] 84 L. J. P. C. 54, [1915] A. C. 355.

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The action, however, had been brought for specific performance of an agreement to deliver certain bonds and shares, and the reference to ascertain damages had been made in default of specific performance. The Board, therefore, held, affirming the judgment of the Court of Appeal on a motion to extend time and for leave to appeal, that the action was 'in the nature of a suit or proceeding in equity' within the meaning of sec. 38 (c) of the Supreme Court Act, which provides that, in such case, an appeal will lie to the Supreme Court from the judgment, 'whether final or not, of the highest Court of final resort' or any province of Canada. Consequently their lordships say—"An appeal as of right against the judgment of April 21st, 1900," (i.e., the judgment of the Ontario Court of Appeal affirming the judgment of the trial judgment for specific performance, and in default damages) "lay under sec. 38 (c) of the Supreme Court Act. That appeal was not taken, and although their lordships are willing to consider that an application under sec. 71" (i.e., for an extension of time for appealing) "was quite competent, that application was made and was refused by the unanimous judgment of the Court of Appeal of Ontario of June 18th, 1912. Their lordships have come to the conclusion that, if these facts had been fully stated and understood as they now are, no leave to appeal would have been given in this case. In their lordship's view it would be most unfortunate that, where a matter could have been brought up in the ordinary course, and where the discretion of the Court has been exercised, of saying that indulgence as to extended time should not be given, the whole of the proceedings should be allowed to come to an end, a long lapse of time intervening, and then the whole matter be opened from the very beginning by an appeal to this Board."

Powers of provincial legislatures in relation to Dominion railways.—Attorney-General for Alberta v. *Attorney-General for the Dominion of Canada,*[8] is an appeal to the Privy Council upon a point of Canadian Constitutional law, in which it is not surprising that the respondents were not called upon. The appellants sought to maintain the validity, of a provincial Act which assumed to empower a provincial railway company to 'take possession of, use, or occupy any lands belonging to' a Dominion railway company, 'in so far as the

[8] 84 L. J. P. C. 58, [1915] A. C. 363.

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taking of such lands do not unreasonably interfere with the construction and operation of' such railway. It also purported to authorise the provincial railway company, under a like condition, 'to use and enjoy . . . the right of way, tracks, terminals, stations or station grounds of' a Dominion railway. Their lordships had no difficulty in holding the Act *ultra vires;* and that it would still be so even if the word 'unreasonably' were omitted. Their lordships say:—

"Railways such as are described in sec. 92, sub-secs. 10 (a) and (c) (of the British North America Act) come under the exclusive legislative authority of the parliament of Canada. The provincial legislature, therefore, has no power to affect by legislation the line or works of such a railway. . . . The provisions of the Act . . . of the legislature of Alberta constituted unquestionable legislation as to the physical construction and use of the track and buildings of a Dominion railway, and that of a serious and far reaching character. Their lordships have no hesitation, therefore, in pronouncing (it) *ultra vires* of the Alberta legislature. They are further of opinion that it would not become *intra vires* if the word 'unreasonably' were struck out of the section. It would still be legislation as to the physical tracks and works of the Dominion railway, and as such would be beyond the competence of the provincial legislature." Perhaps the Board has never had an easier constitutional question to deal with. The judgment of the Board, however, requires notice for another reason than the point of Constitutional law decided in it. The matter came up originally before the Supreme Court upon questions admitted by the Governor-General in Council under the provision of the Supreme Court Act in that behalf. The questions were directed to the constitutionality as a whole of the provincial legislation, but on hearing before the Supreme Court, counsel for the appellants practically confined their arguments to the single case of a provincial railway owning the track of a Dominion railway. Their lordships say, as to this, that they, "are of opinion that great care should be exercised in permitting questions thus referred to the Supreme Court to be varied, more especially when those questions come up on appeal for decision by their lordships. It may no doubt happen that the questions relate to matters which are in their nature severable, so that the answers given may cast

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light upon the effect of the deletion or alteration of parts of the provisions the validity of which is being considered. But their lordships do not desire to give any countenance to the view that counsel may vary the questions by hypothetical limitations not to be found in the provisions themselves or in the questions that relate to them."

Railway Crossings.—Nevertheless, the Board say that they consider the case chosen by counsel has strong claims for separate consideration, and as to it they say:—"The parliament of the Dominion is entitled to legislate as to these crossings" (*sc.* by a provincial railway of the track of a Dominion railway) "because they are upon the right of way and track of the Dominion railway as to which the Dominion parliament has exclusive rights of legislation, and, moreover, as the provincial railways are there by permission and not of right, they can fairly be put under terms and regulations. But sec. 8 of the Railway Act of the Dominion and the clauses which are by it made binding on any provincial railway crossing a Dominion railway appear to their lordships to indicate that it is part of the functions of the Railway Board to permit and to regulate such crossings. . . . By these provisions the Dominion legislation has in their lordships' opinion given to provincial railways desiring to cross a Dominion railway all the *locus standi* that they need for making an application to the Railway Board for permission to do so. The Railway Board is bound to exercise these powers given to it just as much as all other powers given to it so as to advance the best interests of the public. In this way the legitimate claims of provincial railways are in fact met as fully as is practicable, and this without risking the chaos of overlapping legislative powers."

The John Deere Plow Company Ltd. v. *Wharton*,[4] we have already noticed at great length in our issue for February last.

Donationes mortis causâ.—It is pointed out by Lord Hardwicke in *Ward* v. *Turner*,[5] that *donationes mortis causâ* fall into two classes. There is first the class of cases in which a complete delivery or transfer takes place, such as would be sufficient in the case of an ordinary gift, and as in

[4] 84 L. J. Ch. 64, [1915] A. C. 330.
[5] 2 Ves. sr. 431.

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the case of a *donatio mortis causâ* would necessitate a re-transfer to the donor should he recover. And there is also, as regards some kinds of property at all events, a second class of cases, in which the transaction is sufficiently effected by an inchoate or incomplete delivery or transfer, such as would not be sufficient in the case of an ordinary gift, and as in the case of a *donatio mortis causâ* requires something further to be done by the legal personal representatives of the donor after his death. The recent case of *In re Wasserberg,*[6] illustrates the latter class of case. Wasserberg was the owner of certain bonds to bearer which he kept in the custody of his bank in a locked box; of which he kept the key. Being about to undergo a serious operation, he gave his wife a list of the bonds, and also his bunch of keys containing the key of the locked box, and told her to lock them up together, which she did. He had previously on the same day expressed his desire that his wife should have the bonds in the event of his death. Sargant, J., held that the delivery of the key transferring to the wife a partial dominion over, or part of the means of getting at the bonds, though not a sufficient delivery to support a gift *inter vivos* was, under the circumstances, a sufficient delivery to effect a *donatio mortis causâ*.

Alien enemies' right of action.—The effect of the Imperial Aliens Restriction Act, 1914, and the Aliens Restriction Order, 1914, is that an alien registered in the United Kingdom under those Acts, not only has license to remain in the United Kingdom, but is forbidden to leave it without special permission. The same is the effect of the Dominion Order in Council of October 28th, 1914, which amongst other things, provides that—'No alien of enemy nationality shall be permitted to leave Canada without an exeat from a Registrar of Alien Enemies.' The recent case of *Thurn and Taxis (Princess)* v. *Moffit,*[7] decides that an alien enemy,—or, in this particular case, an alien's enemy's wife—may, under such circumstances, maintain an action in the Courts. Sargant, J., in delivering judgment says: "There certainly seems to be a general impression that during the continuance of a state of war an alien enemy as such is not entitled to any relief at law as a plaintiff in the Courts of this Country. . . . The law applicable to the circumstances is, in my

[6] 84 L. J. Ch. 214, [1915] 1 Ch. 195.
[7] 84 L. J. Ch. 220, [1915] 1 Ch. 58.

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opinion, correctly stated in Hall's International Law (6th ed.), p. 388, as follows:—'When persons are allowed to remain, either for a specified time after the commencement of war, or during good behaviour, they are exonerated from the disabilities of enemies for such time as they in fact stay, and they are placed in the same position as other foreigners except that they cannot carry on a direct trade in their own or other enemy vessels with the enemy country.'"

Covenant in restraint of trade.—Goldsoll v. *Goldman*,[8] was an appeal from the judgment of Neville, J., noted *supra* pp. 169-170. The only point raised on the appeal was whether the covenant entered into by Goldman in restraint of trade was wider than was reasonable and necessary for the plaintiff's protection, and if so, whether it was severable and was valid in so far as necessary for the plaintiff's protection. In the result the judgment of Neville, J., was affirmed in so far as it limited the area of restraint to the United Kingdom and the Isle of Man, discarding the limitation to foreign countries. "That such a covenant is severable in this respect has been decided by authorities nearly 200 years old": per Cozens Hardy, M.R. The judgment below, however, was varied by discarding that part of the restraint which related to real jewellery, and confirming the restraint to imitation jewellery. "Then comes the question whether the doctrine of severability is applicable to this part of the covenant. In my opinion it is, and the covenant is good in so far as it purports to restrain the covenantor from carrying on business in imitation jewellery:" per Cozens Hardy, M.R., at p. 230. Kennedy and Swinfen Eady, L.JJ., concurred with the Master of the Rolls.

Sale of land free from incumbrance followed by payment into Court.—In re Wilberforce's Trusts,[9]—apparently a case of first impression,—is a decision on the construction of sec. 5 of the Imperial Conveyancing Act 1881,—our R. S. O. 1914, ch. 109, sec. 21—which provides that: 'Where land subject to an incumbrance, whether immediately payable or not, is sold by any Court or out of Court. . . . The Court . . . may on the application of any party to the sale, direct or allow payment into Court . . . of such amount as,

[8] 84 L. J. Ch. 228, [1915] 1 Ch. 292.
[9] 84 L. J. Ch. 252, [1915] 1 Ch. 94.

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when invested in securities approved of by the Court, the Court considers will be sufficient by means of the income thereof to keep down or otherwise provide for that charge; and in any other case of capital money charged on the land, of an amount sufficient to meet the incumbrance and any interest due thereon. . . . ' Sargant, J., decides that when payment into Court is made under this section, the charge or incumbrance does not become extinguished as against the purchase money received by or on behalf of the vendors, but the purchase money remains liable to make up any deficiency that may arise owing to the money paid into Court proving inadequate to meet the charge or incumbrance in full when it falls due. At p. 258 he says: "No doubt by the mere substitution of money for land, the chargee is to some extent prejudicially affected, because it is more difficult to trace money than to trace land; but, in a case where as in this case, the purchase money, for the land remains and can be traced, I see no reason why I should relieve the vendors of the land and their successors in title from the obligation which they, as owning the land were under . . . and cast the loss which has occurred in the interval, through the depreciation of investments, upon the chargees, who had nothing whatever to do with a sale, which was the result of a purely voluntary act on the part of the vendors." He also holds that in such cases, the amount to be paid in to meet the incumbrance is not necessarily merely the bare amount of the capital charge, but the Court may direct payment into Court of such amount as, when invested in government securities (our Act says—'securities approved by the Court') it considers will be sufficient to meet the capital charge and interest thereon.

Personal liability of solicitors for goods ordered on behalf of client.—Wakefield v. *Duckworth and Co.*,[10] has a special interest to solicitors, inasmuch as the Court decided in it that a firm of solicitors who had ordered certain photographs from the plaintiff, a photographer, for the purpose of litigation in which they were acting for a client, were not liable to pay the photographer's bill. The grounds of the decision are clearly put in the following passage from the judgment of Lord Coleridge:—

[10] 84 L. J. K. B. 335, [1915] 1 K. B. 218.

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"There is no question that the plaintiff knew that the defendants were solicitors acting on behalf of a client, and that being so, apart from any other considerations, they were agents acting on behalf of a principal. *Prima facie* in such a contract the plaintiff would have to have recourse to the principal and not the agent. It is said, however, that in the present case the mere fact that the solicitors by their partner gave the order made them personally responsible. That is not so. There are certain exceptional cases in which, although one party to a contract knows that the other is a solicitor, acting for a client, yet the solicitor is personally responsible, for instance, in cash transactions, where it is to be assumed that the solicitor has no authority to pledge the credit of his client. The present transaction was not a cash transaction in that sense, although no doubt an action would lie for the price of the photographs as soon as they were delivered. The bill was an ordinary one for photographs sent in by the plaintiff to the partner who ordered them."

Negligence of Servant.—Ricketts v. *Thos. Tilling, Ltd,*[11] calls for a word of notice. A motor omnibus was being driven by the conductor, who was not authorised to drive, and sitting beside him on the box was the proper driver. The conductor being inexperienced and incompetent to drive, the motor omnibus mounted the pavement and killed a man, in respect of whose death the conductor was afterwards convicted of manslaughter, and injured several others. One of those thus injured brought this action against the omnibus company for damages for personal injuries. The trial judge entered judgment for the defendant on the ground that there was no evidence that the conductor had any authority from the defendants to drive the omnibus. The Court of Appeal granted a new trial. All the judges concurred in their reasons, which are well indicated by the following passage from the judgment of Buckley, L.J., (p. 346) :—"Where the act which was the immediate cause of the accident was done by a person who *prima facie* ought not to have done it, then, if, as in *Beard's Case,*[12] it was done not by reason of any negligence on the part of the person authorised to do it, the person must prove that the person who did the act was in doing it the agent of the defendant; but if the facts are that the

[11] 84 L. J. K. B. 342, [1915] 1 K. B. 644.
[12] [1900] 2 Q. B. 530.

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servant authorised to do the act was present at the doing of it, it is then a question for the jury whether the accident was due to the negligence of that servant in not performing his duty, or whether, he having discharged his duty, the accident was due to the negligence of the man who was immediately doing the act."

Juror conversing with third parties pending verdict.—*The King* v. *Ketteridge*,[13] is a decision of the Court of Criminal Appeal affirming the proposition that if a juror after the judge has summed up in a criminal trial separates himself from his colleagues and, not being under the control of the Court, converses or is in a position to converse with other persons, it is an irregularity which renders the whole proceedings abortive. It is not necessary or relevant to consider whether the irregularity has in fact prejudiced the prisoner, and the only course open to the Court is to discharge the jury and commence the proceedings afresh. The Court refused to consider an explanatory statement which we were told had been made by the juror, which they held could clearly not be admissible evidence.

Stoppage in transitu. Reddall v. *Union Castle Mail S. S. Co. Ltd.*,[14] also requires notice, which cannot be better done than in the words of the headnote: A purchaser of goods consigned them to a destination abroad, the transit being in several stages. At the end of one of such stages he intercepted the goods, and they thereafter remained in the custody of the carriers, who charged him warehouse rent in respect of them. The unpaid vendors having claimed to stop the goods *in transitu*, Bailhache, J., held that the original transit had been terminated by the purchaser, and the right of the vendors to stop the goods *in transitu* was therefore lost.

'To be retained' written by drawer on face of cheque.—In *Roberts and Co.* v. *Marsh*,[15] the short point was whether the fact that the words 'to be retained' had been written across the face of the cheque by the drawer of it prevented it being an unconditional order to pay within the meaning of

[13] 84 L. J. K. B. 352, [1915] 1 K. B. 467.
[14] 84 L. J. K. B. 360.
[15] 84 L. J. K. B. 388, [1915] 1 K. B. 42.

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the definition of a 'bill of exchange" in the English Bills of Exchange Act 1882, sec. 3 (our Bills of Exchange Act, sec. 17), so as to make it not a '*cheque*' within the meaning of that Act, and so justify the bankers on which it was drawn refusing to pay it. The Court of Appeal held that, notwithstanding the words 'to be retained' the document was an unconditional order to pay, and therefore a 'cheque,' which the Act defines as a 'bill' of exchange drawn on a banker payable on demand.' The grounds on which the judgments proceed are well shewn by the following extract from that of Buckley, L.J.:—"The section (sec. 73, our sec. 165) in defining the instrument as an unconditional order to pay means that it must be an unconditional order upon the banker. What one has to see to is that it is free from any condition binding upon the banker. In the present case the condition that the cheque is to be retained is only a condition as between the drawer and the payee. It may mean that the payee is not to negotiate the cheque, or that he is to hand it back to the drawer with a view to its being replaced by a cheque in the banker's usual printed form, to be used instead of it. As regards the banker, however, it is an unconditional order to pay."

Defect in railing at side of steps giving access to premises demised to plaintiff—Accident.—In *Dobson* v. *Horsley*,[16] the Court of Appeal had to decide a point of considerable legal interest. The defendants owned a house, one room in which was let by them to the adult plaintiff, the father of the infant plaintiff. The house was approached from the street by a flight of steps, which were not let with the room but remained in the possession and control of the defendants. On each side of the steps there was an area, from which the steps were protected by a railing. From the railing on one side one of the upright posts was missing, so that there was a gap in the railing on that side. The tenants' child, the infant plaintiff, a boy of three and a half years of age, while playing on the steps, fell through the gap into the area, and was seriously injured. This action was then brought by the father and child for damages; and in it the jury found that the railings were in the defective condition described at the time of the letting so as to be dangerous for children. All the

[16] 84 L. J. K. B. 399, [1915] 1 K. B. 634.

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judges concurred in holding that the defendants were not liable. The authorities are carefully considered in the judgment, and the grounds on which the Court proceeds are lucidly expressed by Buckley, L.J.:—"What seems to flow from these cases as a matter of principle is this: that the lessor, the defendant, is liable in any case in which, by way of implied grant, he enters into an implied obligation to provide something and fails to provide it. But where that is not the case, and where the lessor simply offers to the tenant the right to use a particular sort of approach, and the tenant accepts it, the tenant must accept the approach such as it is —say a plank with no handrail across a stream, or steps protected only by a coping eight inches high. The tenant using it is not trapped in any way; he knows perfectly well that there is no handrail or railing, and he accepts the risk of using the access in the form in which it is provided. In the case we now have to decide, what was offered to the tenant was access to a room by some steps; on one side of the steps there was obviously a defective railing, a railing such as would not prevent a small child from falling into the area, if carelessly allowed to be there and no proper precautions taken to prevent its falling. The defective railing was obvious to persons using the steps; it was no trap by the lessor. . . . It is said that the plaintiff, or rather one of the plaintiffs, in this action is a child of three and a half years old, and is deserving of greater protection because of his tender years. I do not accede to that. If this was a dangerous place, as obviously it was, the child ought not to have been there without proper protection; and the liability of the defendant cannot be enlarged by exposing him to a liability for not providing such a railing as would prevent a child from falling into the area." It is well to supplement this, however, with the following words from the judgment of Phillimore, L.J.:—"If these railings had been in such a condition that they would have given way if any one had laid his hand on them or stumbled against them, this case would have been like *Miller* v. *Hancock*.[17] If there is a step, any one is entitled to assume that he can safely tread upon it. And if there is a balustrade, then, if the balustrade fails to bear reasonable pressure that constitutes a trap. But if a step is of just the width and just the height that it appears

[17] [1893] 2 Q. B. 177.

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to be, no one can complain because it is not wider or not shallower. And here no complaint can be made because the railings were not closer together than they were. There was no trap, and no warranty that the railings would be closer together than in fact they were. Therefore there is no cause of action.

Criminal law—Procedure on Indictment containing several counts.—One more case in the April reports remains to be noticed namely, *Rex* v. *Norman*,[18] where the Court of Criminal Appeal laid it down that where an indictment contains counts for obtaining goods by false pretences and also counts for obtaining credit under false pretences, the prisoner ought not to be tried on them all at the same time; the prosecution should be called upon to proceed on one count at a time. For, as Lush, J., delivering judgment says:—"If the prisoner is tried upon them all at once very serious difficulties may arise, inasmuch as evidence which is admissible on the charge of obtaining credit by false pretences may not be admissible on the charge of obtaining chattels by false pretences; and when all the evidence on both charges is before the jury it is very difficult, if not impossible for them to separate the evidence when they come to consider their verdict."

A. H. F. L.

CANADIAN CASES.

Provincial Objects.—In *Bonanza Creek Gold Mining Company* v. *The King*,[1] is a case which raises in concrete form one of the points touched on in *The Companies Reference*.[2] A mining company was incorporated under the Ontario Companies Act with power to carry on 'the business of mining and exploration in all their branches.' That Act enables a charter to be granted 'for any of the purposes or objects to which the legislative authority of the legislature of Ontario extends' certain persons acquired leases of valuable mining lands in the Yukon territory and assigned them

[18] 84 L. J. Q. B. 440, [1915] 1 K. B. 341.
[1] (1915) 50 S. C. R. 534.
[2] 48 S. C. R. 331.

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to the company. It has long been too often a thankless task to try and extract a statement of law from the judgments of the different members of our Supreme Court in important cases; and this is no exception. We have again a three to two decision; and only two of the three distinguished jurists who form the majority agree on a question of principle. The result as stated by Sir Louis Davies is that the company has neither the power nor the capacity to carry on mining operations in the Yukon Territory that being a part of Canada thousands of miles distant from Ontario. The Chief Justice held the company was not competent to take the assignment. Duff, J., agreed for different reasons; Idington and Anglin, JJ., dissented.

Witnesses Living Abroad.—It has been held by the Supreme Court *en banc* of Saskatchewan that where a party depends upon the evidence of certain witnesses residing abroad to make out his case and the witnesses refuse to attend the trial, the party being powerless to compel their attendance, the evidence may be taken on commission under Rule 365: 'The Court or Judge may, in any cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before the Court or Judge or any officer of the Court, or any other person, and at any place, of any witness or person, and may empower any party to any such cause or matter to give such deposition in evidence therein, on such terms if any as the Court or Judge may direct.' It was further held on the authority of *Cock* v. *Allcock*,[3] that the fact that the witnesses in question were in the employ of the party desiring to obtain their evidence was immaterial. It was not shewn that he could compel their attendance; and the fact that they were in his employ did not disentitle him to an order for a commission *Coristine and Co.* v. *Haddad*.[4]

Assignee Entering into Possession without Disclaiming Lease.—Another example of the rule of *Write* v. *Hunt*,[5] has just come up in Alberta. In the case of *North West Theatre Co., Ltd.*, v. *McKinnon*,[6] the lessee of the premises in ques-

[3] 21 Q. B. D. 1.
[4] (1915) 30 W. L. R. 849.
[5] L. R. 6 Ex. 32.
[6] (1915) 30 W. L. R. 897.

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tion assigned to the defendant who went into possession as official assignee under the Assignments Act. He wrote to the solicitors of the plaintiff, the lessor, promising to pay the rent, which he did for three months. He then sought to repudiate further liability. It was held by Ives, J., that the law was perfectly clear and that judgment should go for the plaintiff. Where an assignee of an insolvent acts under his deed of assignment and enters into possession of the premises held by the insolvent under the lease, without clearly disclaiming the lease, he accepts the lease and becomes personally bound by its covenants. See also *Hanson* v. *Stevenson and Milns;*[7] *Rendall* v. *Andrews.*[8]

New Evidence Discovered after an Appeal.—When there has been a trial and an appeal and later new evidence is discovered upon which it is desired to reopen the case leave should be obtained from the Appellate Division before any step is taken. *Crowley* v. *Boving and Co.,*[9] following *Trethewey* v. *Trethewey.*[10] The plaintiff whose appeal had been dismissed served notice of motion to reopen the hearing of the appeal and for a new trial. In support of the motion he proposed to examine three witnesses, with a view to reading their depositions at the hearing of the motion. An appointment was obtained from a local officer for their examination, but this was set aside and on appeal a Divisional Court held the appointment had been improperly issued no leave having been obtained.

L. D.

We add notes of certain very recent judgments of the Supreme and Exchequer Courts.

[7] 106 E. R. 113.
[8] 61 L. J. Q. B. 630.
[9] (1915) 8 O. W. N. 219.
[10] (1907) 10 O. W. R. 893.

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SUPREME COURT OF CANADA.

SASK.] [FEBRUARY 2ND, 1915.

TRUSTEES OF REGINA PUBLIC SCHOOL DISTRICT v. TRUSTEES OF GRATTON SEPARATE SCHOOL DISTRICT.

Education — School boards — Assessment and taxation — Taxes payable by incorporated companies—Apportionment—Shares for public and separate school purposes—Notice—Construction of statute — Legislative jurisdiction — "B. N. A. Act, 1867," s. 92 — "Saskatchewan Act." 4 & 5 Edw. VII., c. 42, s. 17—"School Assessment Act," R. S. Sask., 1909, c. 101, ss. 93, 93a.

Section 93 of the Saskatchewan "School Assessment Act," R. S. Sask. 1909, ch. 101, authorizes any incorporated company to give a notice requiring a portion of the school taxes payable by the company to be applied to the purposes of separate schools, and sec. 93*a*, as enacted by sec. 3 of ch. 36 of the Saskatchewan statutes of 1912-1913, authorizes separate school boards themselves to give a similar notice to any company which fails to give the notice authorized by sec. 93. A number of companies neglected to give the notice provided for and the separate school board gave them notices requiring a portion of their taxes to be applied for the purposes of that board. In these circumstances the public school board claimed the whole of the taxes payable by the companies in question and the separate school board claimed a portion of such taxes. On a special case, directed on the application of the municipal corporation, questions were submitted for decision, as follows: (*a*) Had the Saskatchewan Legislature jurisdiction to enact sec 93*a* of the "School Assessment Act"; (*b*) If question (*a*) be answered in the negative, has the defendant (the separate school board) the right it claims to a portion of the said taxes; (*c*) If question (*a*) be answered in the affirmative, has the defendant the right it claims to a portion of the said taxes?

Per DAVIES and DUFF, JJ. (expressing no opinion as to the constitutionality of the legislation), that the effect of the enactments in question was not to give the separate school board any portion of the taxes claimed by it. The Chief Justice and ANGLIN, J., *contra*.

Per IDINGTON, J.—The enactment of sec. 93*a* was *ultra vires* of the Legislature of Saskatchewan. The Chief Justice and ANGLIN, J., *contra*.

Per FITZPATRICK, C.J., and ANGLIN, J.—The Legislature of Saskatchewan had jurisdiction to enact sec. 93*a* of the "School Assessment Act," and the taxes payable by the companies in question should be apportioned between the public and the separate school boards in shares corresponding with the total

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assessed value of assessable property assessed to persons other than incorporated companies for public school purposes and the total assessed value of property assessed to persons other than incorporated companies for separate school purposes respectively.

Judgment appealed from (7 West. W. R. 7), reversed, the Chief Justice and ANGLIN, J., dissenting.

Appeal allowed with costs.

Nesbitt, K.C., and *Chris. C. Robinson*, for the appellant.
H. Y. Macdonald, K.C., for the respondent.

SUPREME COURT OF CANADA.

ALTA.] [FEBRUARY 2ND, 1915.

THE SASKATCHEWAN LAND AND HOMESTEAD CO. AND THE TRUSTS AND GUARANTEE CO. v. THE CALGARY AND EDMONTON RAILWAY CO.

Railways—Expropriation—Materials for construction—Statute—"Railway Act," R. S. C. 1906, c. 37, ss. 180, 191, 192, 193, 194, 196—Compensation—Date for ascertainment of value—Order for possession—Deposit of plans—Approval of Board of Railway Commissioners.

With regard to obtaining materials for the construction of railways the effect of sub-sec. 2 of sec. 180 of the "Railway Act," R. S. C. 1906, ch. 37, merely requires the general provisions of the Act relating to the using and taking of lands to be observed in so far as they are appropriate to the expropriation of the lands and settling the compensation to be paid therefor; sec. 192 of the Act has no application to such a case.

Notices were given, in compliance with secs. 180, 193 and 194 of the "Railway Act," and, before any change had taken place in respect to the value of the lands to be taken, the railway company obtained an order of a judge permitting it to do so and took possession of the lands in question.

Held, that the title of the company to the lands, when consummated, must be considered as relating back to the date when such possession was taken and that the compensation payable therefor should be ascertained with reference to that time.

Judgment appealed from (6 Alta. L. R. 471), affirmed.

Appeal dismissed with costs.

Whiting, K.C., and *A. B. Cunningham*, for the appellants.
O. M. Biggar, K.C., for the respondents.

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SUPREME COURT OF CANADA.

MAN.] [FEBRUARY 2ND, 1915.

PHELAN v. GRAND TRUNK PACIFIC R. W. CO.

Railways—Operation—Equipment—Coupling apparatus—Duty to provide and maintain—Protection of employees—Inspection —"Inevitable accident"—Negligence—Findings of jury—Evidence—Common employment — Conflict of laws—"Railway Act," R. S. C. 1906, c. 37, s. 264—Construction of statute —Vis major.

A car attached to a fast freight train arrived at a station on a railway, in Saskatchewan, during a cold night in the winter. It was equipped with an approved coupling device, as required by sec. 264 (c) of the "Railway Act," R. S. C. 1906, ch. 37, and, on the arrival of the train, it had been inspected according to the usual practice and no defect was then found. When the train was being moved for the purpose of cutting out the car, the uncoupling mechanism failed to work and, in consequence, the plaintiff, an employee, received injuries. Subsequently, the coupler was taken apart and it was then discovered that the locking-block was jammed with ice (not visible from the exterior), which had formed inside the chamber and prevented its release by the uncoupling device used to disconnect the car before the train was moved. In an action for damages, instituted in the Province of Manitoba, the jury found that the company had been negligent "through lack of proper inspection," and judgment was entered on their verdict. On appeal from the judgment of the Court of Appeal for Manitoba setting aside the verdict and entering judgment for the defendants:—

Held, per FITZPATRICK, C.J., and DAVIES and ANGLIN, JJ.—The obligation resting upon the company, both under the statute and at common law, was discharged by the customary inspection of the car which had been made according to what was shewn to be good railway practice, and there was no further duty imposed in regard to unusual conditions not perceivable by the ordinary methods of inspection.

Per DAVIES and ANGLIN JJ.—Viewed as a finding upon a question of fact, the verdict of the jury upon the technical question as to the system of inspection should be set aside as being against evidence: *Jackson* v. *Grand Trunk R. W. Co.*, 32 S. C. R. 245; *Jones* v. *Spencer*, 77 L. T. 537; *Metropolitan Asylum District* v. *Hill*, 47 L. T. 29; *Jackson* v. *Hyde*, 28 U. C. Q. B. 294; and *Field* v. *Rutherford*, 29 U. C. C. P. 113, referred to.

Per ANGLIN, J. (IDINGTON, J., *contra*).—The defence of common employment, although taken away by legislation in the Province of Saskatchewan, where the injuries were sustained, was

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available as a defence in the courts of Manitoba, where the action was brought: *The "Halley,"* L. R. 2 P. C. 193, referred to.

Judgment appealed from (23 Man. R. 435), affirmed, IDINGTON and DUFF, JJ., dissenting.

Per IDINGTON and DUFF, JJ., dissenting.—Section 264 of the "Railway Act" imposes upon railway companies the absolute and continuing duty not only to provide but also to maintain in efficient use the apparatus thereby required; where it is shewn that the apparatus failed to operate, when used, the onus is upon the railway company to shew that there had been a thorough inspection thereof made to ascertain that it was in efficient working order before the train was moved: *Johnston* v. *Southern Pacific Railway Co.*, 25 S. C. R. 158, referred to.

Appeal dismissed with costs.

F. B. Proctor, for the appellant.

C. H. Locke, for the respondents.

SUPREME COURT OF CANADA.

QUE.] [FEBRUARY 2ND, 1915.

PREVOST, (CURATOR OF THE PHOENIX LAND IMPROVEMENT CO.) v. BEDARD.

Present:—SIR CHARLES FITZPATRICK, C.J., and IDINGTON, DUFF, ANGLIN and BRODEUR, JJ.

Illicit contract—Lottery—Sale of land—Subsequent purchaser—Action pétitoire — Right of recovery — Ultra vires — Legal maxim—Notary.

D. sold lands to an incorporated company for the purpose of assisting in carrying on a lottery scheme and, subsequently, conveyed the same lands to the plaintiff who brought an action, *au pétitoire*, claiming the lands and to have the deed to the company set aside.

Held, per FITZPATRICK, C.J., and ANGLIN and BRODEUR, JJ., that the conveyance to the company was void for illegality and that the plaintiff had the right of action to be declared owner of the lands subsequently conveyed to him and to have the prior conveyance to the company set aside as having been granted for illicit consideration. *Lapointe* v. *Messier*, 49 S. C. R. 271, followed.

Per DUFF, J.—The company had no power to acquire the lands for the purpose of carrying on the lottery and, consequently,

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their contract was *ultra vires* and void: *Ashbury Railway Carriage and Iron Co.* v. *Riche*, L. R. 7 H. L. 653, followed. And, further, as the notary before whom the deed in question was executed was, at the time of its execution, an official of the company assuming to purchase the lands, the deed was without validity as an authentic conveyance of the lands to the company.

Per IDINGTON, J., dissenting.—As the plaintiff obtained his conveyance in circumstances which placed him in the same position as the vendor, who had knowingly entered into the illicit contract with the company and to whom the right of recovery was not open, there could be no relief given by the Courts as prayed in the action.

Judgment appealed from (Q. R. 43 S. C. 50), affirmed, IDINGTON, J., dissenting.

Appeal dismissed with costs.

Lamarche, K.C., for the appellant.

St. Germain, K.C., for the respondent.

SUPREME COURT OF CANADA.

QUE.] [MARCH 15TH, 1915.

PRICE v. CHICOUTIMI PULP CO.

Present:—DAVIES, IDINGTON, DUFF, ANGLIN and BRODEUR, JJ.

Libel—Business reputation—Action by incorporated company—Truth of facts alleged—Fair comment—Justification—Public interest—Qualified privilege—Charge to jury—Misdirection—Misleading statements—Practice—Evidence of special damage—New trial.

There being a dispute between the parties as to the ownership of certain lands, the plaintiffs, a commercial corporation, obtained special legislation vesting the lands in question in the company. On becoming aware of this legislation, the defendant published letters in several newspapers accusing the company of obtaining it by political influence and preventing him vindicating his title in the courts. In an action to recover damages for libel, the trial judge told the jury that the defendant's defence of justification would be established if they were satisfied that, although in fact untrue, the defamatory statements had been made in honest belief of their truth, and that, if the publications were an honest comment on the facts as stated, that, in itself, would be sufficient to establish the defence of fair comment. On the findings of the jury, judgment was

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entered for the defendant, but this judgment was set aside, on the ground of misdirection, by the judgment appealed from and a new trial ordered.

Held, per curiam, that where damages of a special nature have been suffered in respect of its property or business reputation, a commercial corporation can maintain an action for libel.

Held, per IDINGTON, DUFF, ANGLIN and BRODEUR, JJ., DAVIES, J., dissenting.—That the directions by the trial judge as to the defences of justification and fair comment were erroneous and misleading.

Per DAVIES, J., dissenting.—Taken as a whole, the charge of the trial judge was clear and explicit and placed the material issues fairly before the jury, and, consequently, the judgment entered at the trial on the finding of the jury ought not to be disturbed.

Per ANGLIN, J., dissenting.—That, as a judge could not properly rule or a jury reasonably find that the defendant's letters were calculated to injure the property of the plaintiffs or their business reputation, as a commercial corporation, they could not recover without proof of special damage.

Judgment appealed from (Q. R. 22 K. B. 393), affirmed, DAVIES and ANGLIN, JJ., dissenting.

Appeal dismissed with costs.
Cross-appeal dismissed with costs.

G. G. Stewart, K.C., and *L. St. Laurent*, for the appellant.
E. Belleau, K.C., and *A. Taschereau*, K.C., for the respondents.

SUPREME COURT OF CANADA.

B.C.] [MARCH 15TH, 1915.

CREVELING v. THE CANADIAN BRIDGE CO.

Present:—SIR CHARLES FITZPATRICK, C.J., and DAVIES, IDINGTON, DUFF, ANGLIN and BRODEUR, JJ.

Negligence—Defective system—Injury to employee—Evidence—Verdict—Practice—Exception to judge's charge—New trial—New points on appeal.

During bridge construction a travelling crane was operated on elevated tracks under a system which did not provide for signals on every occasion when it was set in motion and it was not provided with guards for the protection of workmen employed upon the elevated stagings. A signal was given, on starting the crane, at some distance from the workmen. Shortly afterwards it came to a momentary stop and moved on again

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towards the workmen without any further signal and plaintiff was injured. In his action for damages, the plaintiff charged want of proper system and guards. The Court of Appeal set aside a judgment in favour of plaintiff, upon a general verdict by the jury, and ordered a new trial for the purpose of assessing damages under the British Columbia "Employers' Liability Act," on the ground that it had been admitted that there was a system in existence which, if properly carried out, would have been sufficient for the protection of the workmen.

Held, that, on a proper appreciation of the evidence, having regard to the course of the trial, the directions of the trial judge had presented the issues fully to the jury, and, there being evidence to support it, their verdict ought not to have been disturbed. DAVIES and ANGLIN, JJ., dissented.

Per DUFF and BRODEUR, JJ.—Where exception to the directions of the judge has not been taken at the trial or in the first court of appeal, it is too late to urge such objections upon a subsequent appeal to a higher court: *White* v. *Victoria Lumber and Manufacturing Co.* [1910], A. C. 606, followed.

Appeal allowed with costs, and trial judgment restored.

S. S. Taylor, K.C., for appellant.

W. N. Tilley, for respondents.

EXCHEQUER COURT.

AUDETTE, J.] [NOVEMBER 7TH, 1914.

IN THE MATTER OF THE PETITION OF RIGHT OF CYRILLE TURGEON, OF THE PARISH OF ST. CHARLES DE BELLECHASSE, IN THE COUNTY OF BELLECHASSE, IN THE DISTRICT AND PROVINCE OF QUEBEC, BRAKEMAN, AND HIS MAJESTY THE KING.

Negligence — Government Railway — Brakesman attempting to board moving train—Rules of 1889—"Person"—Acceptance of risk—Faute commune—Liability.

The suppliant while employed as a brakesman on a government railway attempted to board a way-freight train while in motion. In doing so he slipped and fell, a wheel of the last truck of the van passing over one of his legs injuring it to such an extent that it had to be amputated. By rule 48 of the railway regulations of 7th December, 1889, it was provided that 'no person

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shall be allowed to get into or upon or quit any car after the train has been put in motion, or until it stops. Any person doing so, or attempting to do so, has no recourse upon the Railway Department for any accident which may take place in consequence of such conduct.'

Held, that suppliant was a "person" within the meaning of the above rule and was subject to its provisions.

2. That the suppliant accepted the risk incidental to his attempt to board a moving train.

3. That as the proximate cause of the accident was the suppliant's act in attempting to board a moving train, he had contributed to the determining cause of his injury and the doctrine of *faute commune* could not be applied even if the railway authorities had been guilty of negligence in allowing the platform of the car by which the suppliant attempted to board the train to be defective—a fact not so found by the Court.

Lane, K.C., for suppliant.

Jolicoeur, for respondent.

EXCHEQUER COURT.

CASSELS, J.] [JANUARY 13TH, 1915.

HORACE G. JOHNSON, AND HENRY S. COOPER AND PENMANS, LIMITED v. THE OXFORD KNITTING COMPANY, LIMITED.

Patent of Invention—Proper method of construction—Specification and claim—Canadian Patent No. 130413 for closed crotch underwear—Infringement.

Held, that a patent for invention should be construed in the same way as any other written instrument. According to the true canons of construction the claim of the patent should not be read without reference to the specification. The whole document must be looked at to see what the claim is: *Canadian Car Heating Co.* v. *Came*, [1903] A. C. 509, followed. *Edison-Bell Phonograph Corporation (Ltd.)* v. *Smith* (1894), 10 T. L. R. 522, specially referred to.

Canadian Patent No. 130413 held not to be infringed by a garment using two flaps to obtain a permanently closed crotch.

Aylen, K.C., for plaintiffs.

Languedoc, K.C., for defendant.

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EXCHEQUER COURT.

CASSELS, J.] [JANUARY 26TH, 1915.

IN RE 251 BARS OF SILVER ET AL. v. CANADIAN SALVAGE ASSOCIATION.

Admiralty law—Practice—Appeal from interlocutory order—The Admiralty Act, 1891, c. 14, s. 14.

Held, where a method of procedure on appeal is prescribed by statute such procedure must be followed in its entirety: *Supervisors* v. *Kennicott*, 94 U. S. 498, referred to.

2. Where the appellant on an appeal from the order of a local Judge in Admiralty to the Exchequer Court failed to obtain the permission of such local judge or the judge of the Exchequer Court for such appeal being taken, the appeal was dismissed for not having complied with the requirements of the statute.

Gibsone, K.C., for appellants.
Pentland, K.C., for respondents.

EXCHEQUER COURT.

CASSELS, J.] [JANUARY 26TH, 1915.

IN RE 251 BARS OF SILVER ET AL. v. CANADIAN SALVAGE ASSOCIATION.

Admiralty law — Shipping — Salvage — Release and bail—Competency of incorporated company to contract as surety—Practice.

Held, that in a salvage case arising in the Quebec Admiralty District an incorporated company duly authorized by law to carry on the business of suretyship may be accepted as bail for the purpose of releasing the property salved.

Gibsone, K.C., for appellants.
Pentland, K.C., for respondents.

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EXCHEQUER COURT.

AUDETTE, J.] [MARCH 29TH, 1915.

THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA v. JOHN MANUEL.

Expropriation—Basis of Compensation—Gentleman's residence—"Market value" and "intrinsic value" distinguished — "Quantity survey method" considered in relation to establishing market value.

Held, that the owner of property expropriated is entitled to have the compensation assessed at its market value in respect of the best uses to which it can be put, *e.g.*, where a property has its chief value as a gentleman's residence commanding a good view and with a fairly desirable location that is the value upon which compensation should be assessed.

2. Compensation for property taken under the authority of the Expropriation Act, R. S. 1906, c. 143, is to be assessed upon the market value of the property and not upon its intrinsic value.
3. Distinction between the terms market value and intrinsic value stated.
4. The so-called "quantity survey method" considered in relation to ascertaining the true market value of property expropriated.

Hogg, K.C., for plaintiff.

Henderson, K.C., for defendant.

EXCHEQUER COURT.

AUDETTE, J.] [APRIL 12TH, 1915.

THE KING v. THE CANADIAN PACIFIC LUMBER CO.

Expropriation—Value of water-lot — Right to make erections—Abandonment — The Expropriation Act, s. 23 — Measure of damages.

Where a water-lot with no erections thereon, is expropriated for the purpose of a public work, its value must be assessed as at the date of the expropriation, without considering what enhanced value would be given to the water-lot if the approval of the Crown to make erections were obtained. On the other hand such assessment must be made in view of such riparian rights as are actually enjoyed by the owner at the time of the taking: *Lyon* v. *Fishmongers* (1 A. C. 622), referred to.

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2. Where land used as a piling ground in connection with a sawmill, is taken by the Crown and subsequently abandoned, under sec. 23 of *The Expropriation Act*, the owner is entitled to damages measured by what the property would have been worth to him if used in such connection during the time it was vested in the Crown and the owner was out of possession.

Ritchie, K.C., and *Maitland*, for plaintiff.
Armour, for defendants.

EXCHEQUER COURT.

CASSELS, J.] [APRIL 21ST, 1915.

MONTGOMERY v. THE KING.

Exchequer Court Act, R. S. 1906, c. 140, s. 20 (a)—"Public Work" —Dredge belonging to Dominion Government.

Held, following the views expressed by the judges of the Supreme Court in the case of *Paul* v. *The King* (38 S. C. R. 126), that a dredge belonging to the Dominion Government is not a "Public Work" within the meaning of sec. 20 (c) of the Exchequer Court Act.

Birnie, K.C., for suppliant.
Cresswick, K.C., for respondent.

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CONTEMPORARY LEGAL REVIEWS AND PERIODICALS.

The Michigan Law Review for April, 1915, opens with a review of the recent translation of the Year Book of 12 Rich. II. (1388-9), edited for the Ames Foundation by George F. Deiser of the Philadelphia Bar. It is notable for several things,—for its length, for the pains employed upon it, for the learning displayed by the reviewer, Mr. John M. Zane, for its unspoken and unsparing denunciation of the mistakes of the translator, and for its excellence of style. Mr. Zane objects in the first place to the selection made by Mr. Deiser for his translation, maintaining that the Year Book of the seventh year of the reign would have been much better: 'The very fact of a new Court is the great objection to the twelfth year. The Courts are inadequately equipped with judges. There are only three judges in the two great Courts of England. But this is aggravated by the fact that they are of the dull, stupid, sort of men who, it is true, often make quite respectable, plodding judges, for while the really great judge is a rare human being, a very mediocre lawyer on the Bench can make a noise that passes for a judicial deliverance.' He then proceeds to handle Mr. Deiser without gloves. 'I am not sure that Mr. Deiser ought to continue his labours as Editor until he has accumulated a far greater knowledge of mediaeval Common law;' 'Any man who ventures on the slippery ice of the Year book should have, at least, the skates of ordinary knowledge so as to be able to stand upon them, and to cut a few of the rudimentary figures without attracting the laughter of the spectators;' "The Editor can at least say of this translation, as Touchstone says of his Audrey: 'An ill-favoured thing, but mine own;'" and so on. We are bound to say Mr. Zane seems to justify his criticisms by the examples he cites; and we congratulate the Michigan Law Review on possessing, in these shallow and meally-mouthed days, a critic at once so learned, and so vigorous. The Michigan Law Review for April also contains the second of Mr. Theodore P. Ion's interesting Articles on '*The International Status of the Grand Duchy of Luxemburg and the Kingdom of Belgium in relation to the present European War.*' The

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present Article concerns especially the neutrality of Belgium, and is a most excellent one;—far superior in lucidity and interest to most that one is apt to light upon in the leading English Reviews. Mr. Ion shews conclusively that the German contention that the Treaty of 1839 guaranteeing the neutrality of Belgium was superseded by the later Treaty of 1870, is absolutely disingenuous and unsound. On the contrary, as the writer abundantly shews, the Treaty of 1839 is expressly recognised in the Treaty of 1870. The extracts from the speeches of Mr. Gladstone, Lord Granville, and others in the British parliament at the time the Treaty of 1870 was entered into, are well selected and extraordinarily interesting; and make one feel that there were giants in those days. Indeed Mr. Ion confutes the contention now being raised by German apologists out of the mouth of the German Government itself (p. 481). Moreover as he well says:—'Many persons have overlooked the fact that independently of any treaty or guarantee, independently of the Hague Convention, Belgium, as a non-belligerent State was entitled to all the rights enjoyed by every Power which does not participate in a war. Nor have these rights been created by the Treaty of 1839 or by the Hague Convention on the rights of neutrals.' We would that space permitted us to notice the excellent Article at greater length. One extract from an Article of Mr. Gladstone in the Edinborough Review for January, 1871, we cannot refrain from quoting:—'With the destruction of good faith and honour between man and man, between nation and nation, everything else that is worth living for comes in its turn to be destroyed. . . . Whatever else may betide, the policy of England stands firm on this immovable basis, that treaties, when made must be respected. No Government which is to exist in this country can abandon those principles: no Government can flinch from the active defence of them.'

Of the remaining leading Article in this admirable issue of our contemporary,—*Conveyancing in the province of Quebec* by Mr. Howard S. Ross, we will say nothing here. It was originally written for the CANADIAN LAW TIMES, but owing to the change of Editorship was lost sight of. With the kind acquiescence of the Michigan Law Review we hope to publish it *in extenso* in our next number.

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The Harvard Law Review for April, 1915, commences with three most interesting Appreciations of John Chipman Gray, late Royall Professor of Law at Harvard University. Mr. Gray's books on Restraints on the Alienation of Property, The Rule against Perpetuities, The Nature and Sources of law, and especially his Cases on Property in six volumes are well known. As to this side of his work, Mr. Thayer, Dean of the Harvard Law School, makes the excellent remark—"Anyone can write a long book; short books like Mr. Gray's mean the life long toil of a master. He knew the truth in Stevenson's exclamation: 'There is but one art,—to omit. A man who knew how to omit would make an Iliad of a daily paper.'"

Professor Gray was evidently equally eminent and distinguished as a teacher. He lectured to the Harvard Law students on many subjects,—Bankruptcy and the Law of the Federal Courts, Conflict of laws, Evidence, Constitutional law, all branches of the law of Property, and jurisprudence. There are two qualifications which are specially desirable in an academic teacher of law, one is that he should not be too narrow a specialist, but should be well versed in as many different branches of law as possible, and the other is that he should not lose all touch with actual practice. Professor Gray filled both of these requirements in an eminent degree.

Speaking of him in this capacity, Dean Thayer says:—"His scorn of pedantry, his freedom from the least touch of self-consciousness, brought moral as well as intellectual stimulus. He treated his pupils as fellow students, working with him on an equal footing to get at the truth. By so doing he brought before them most effectively the vastness of the law, and he made this very thought, so apt to discourage a beginner, a source of inspiration, for as the student had long since learned that Mr. Gray could stoop to no pose, he was excited by the sense of really helping his master." Mr. S. Willison applies to Professor Gray, words of his own spoken of the late Professor Thayer:—"He was the best type of New Englander, without the creaking of the joints that sometimes marks and mars that estimable personage. It has been said that the difference between a good Bostonian and a good Philadelphian is that the Bostonian thinks everything wrong that is not right, and the Philadelphian thinks

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everything right that is not wrong. In this matter, Mr. Thayer was of the Philadelphian school."

A. H. F. L.

In this same number of the Harvard Law Review Mr. Emlin McClain has an Article on *Contractual Limitation of Liability for Negligence* in which he reviews the different developments of this phase of the subject in English and American jurisdictions. The branch of our law furnishing the aptest material for the construction of an abstract rule as to the validity of contractual limitations of liability for negligence is that of carriers of goods and persons. Since under the English Common law, the public carrier of goods was absolutely liable for all loss not due to an act of God or a public enemy, various considerations resulted in the conclusion come to by English Courts, though not without dissent, that by reasonable notice the carrier might limit his liability. The tendency of American Courts was at one time decidedly the other way; for they reached the conclusion that no mere general notice should be assumed to have been assented to by the shipper as against his right to have his goods carried in accordance with the Common law Rule of the Carrier's extraordinary liability. They were also disinclined to allow any contract actually entered into between shipper and carrier which had the effect of limiting the liability of the carrier. Later, however, the current of opinion changed, and it was held that the shipper might, if he saw fit, by express contract relieve the carrier of the obligation of his public calling and treat him as a private carrier. Another illustration of the difficulty arising in attempting to answer the question as to the validity of contractual limitations of liability, is furnished by the conflict of authorities as to whether an agreed valuation is effectual to limit recovery for a loss by negligence. The view now approved is that the shipper is estopped after putting a valuation on his goods, which must necessarily affect the care which the carrier will exercise in their transportation from claiming that they are of greater value than represented. On the question of the carriage of passengers the general rule, if any, to be deduced from the American passenger cases, is that public policy prevents contractual limitation of liability for negligence.

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Mr. Arthur March Brown has an Article on *Comity in the Federal Courts.* Comity is a word not much used in Canada, but frequently found in reports of United States decisions. It is, says the author, a term of international law, and its best definition in the light of the derivation of the word is "courtesy." In such case it is hardly a term of law at all. Dicey, looking at what the Courts do when they prefer to be actuated by comity, has defined it as "caprice;" and it is perhaps true that no more definite principle than caprice could be said on the whole to govern the attitude of the Courts of one nation towards those of another. Comity in the Federal Courts, however, seems to be the rule, generally followed, that one Federal Circuit Court, will defer to and follow the decision of any other Federal Circuit Court. Extracts are given from various judgments. There are, however, exceptions which the author attributes to human weakness, saying that too many judges of strong individuality are unequal to the self-effacement required to make comity a wholly effective principle of federal jurisprudence. One example he gives is that of Judge Knowles of the District of Montana who when it was urged upon him that if one Circuit Court decided a point all the others should conform, said flatly "This is not a rule which prevails in the Circuit Courts of the United States. In the Bible there is a command: 'Thou shalt not follow a multitude to do evil,'" from all of which we get a new idea of the authority of the Bible in Montana, and of Mr. Justice Knowles' opinion of eminent Judges who differ from him.

There yet remains, in this number of the Harvard Law Review, to receive honourable mention, a long *Judicial Review of Legislation in Canada* by Mr. Charles G. Haines.

The American Law Review for March and April, which contains a portrait of that distinguished Welshman, Sir Samuel T. Evans, President of the Probate Admiralty and Divorce Courts in England since 1910, whom by the way we have heard described as the most celebrated Welshman in the British Isles next to Mr. Lloyd George, has some good Articles. Mr. A. D. Lipscomb treats the question of *Shareholder's Liability to Trustees in Bankruptcy.* The matter is approached not from the statutory point of view but from

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that of the Courts. We note some points of difference between the law in the United States and that in British jurisdictions. The general principles, however, are the same in both systems of jurisprudence, namely, that the ordinary obligation which the stock holder owes to pay his stock in full, notwithstanding an agreement with the corporation to the contrary, is an obligation which may be enforced by the trustee in bankruptcy.

Perhaps the most important Article in this magazine is that entitled '*Inefficiency in the Administration of Justice*' which is the Report of the Committee of the National Economic League. It is the work of the well known writers and jurists, Charles W. Eliot, Louis D. Brandeis, Moorfield Storey, Adolph J. Rodenbeck and Professor Roscoe Pound. An example is given of the way in which the great increase of litigation has so crowded the Courts as to preclude the thoroughness in discussion by counsel and the deliberation by the Court which is necessary. For instance where a century ago a volume of the reports of the Supreme Court of the United States covered a period of fourteen months, during which time 84 cases were decided, a single volume of the reports of that Court covers a single day, June 16th, 1913, in which decisions were rendered in 60 cases. On the respective merits of elected and appointed judges the committee states that in those jurisdictions where there are appointed Courts they have been liberal in questions of constitutional law, while elected judges holding for short terms have been strict and re-actionary; and the report proceeds to say that much more in a judge is required than popularity or honest mediocrity or ignorant zeal for the public welfare. Experience has shewn that in States where the Bar has the most influence in the choice of judges, the Bench achieves the best result. Judicial power once it is obtained is wasted in several ways. One is by the vicious practice of rapid rotation whereby no one judge acquires a thorough experience of any one class of business.

Mr. George M. Hogan has an article on *The Power of a Board of Health to Regulate Discharge of Municipal Sewage into a Water Course.* The Article appears to be in a form of a brief for a case argued in the State of Vermont.

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Among the notes we find a report on the Wisconsin Eugenics Law, the constitutionality of which has been upheld by the Supreme Court, three judges dissenting. This novel statute requires every male person applying for a marriage license to file a physician's certificate that he is free from venereal disease. The clinical tests to be imposed are set out in the law and the physician's fee is fixed at three dollars.

A curious instance of the freak legislation in which so many States are found indulging is that of a recent statute of South Dakota which declares snuff taking to be a crime. The statute forbids importation, manufacture, sale or gift of snuff or any of its substitutes. We wonder whether George Washington thought of this as he talked of liberty and gave a pinch from his snuff-box to his guests at Mount Vernon; and whether the "lady voters" have had their fingers in this pie?

Mr. Theodore Schroeder has an article on *Presumptions and Burden of Proof as to Malice in Criminal Libel.* He takes us back to the time in England when prosecutions for libel were justified wholly by the necessity for preventing disturbances of the peace and had little regard for the natural justice of the case. Since peace and good order were the only avowed justification for prosecuting a libeller the conditions and occasion for a publication, such as actual truth or reasonable belief in the truth, and also aims and motive, were all logically declared to be immaterial. Thus came into being the obsolete aphorism—'The greater the truth the greater the libel; a bad man is sooner provoked (to vengeance) than a good man.' Mr. Schroeder's treatment of the development of the theory of libel is interesting; but he spoils his article by lapses into unscholarly and inaccurate statements. For example, when treating the breach of the peace theory of libel he says—"It has often occurred that those who wish to clothe their inequities with the appearance of right will resort to legal forms and fictions. That is what occurred in the present instance, and the true but concealed motive was a desire to protect the aristocrats in the perpetual enjoyment of privileges." Such statements are

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more to be expected in a campaign against the House of Lords than in a sober historical document. Mr. Schroeder is quite wrong; for there was no motive, concealed or otherwise; at the time the breach of the peace theory of libel grew up the Courts were not concerned with aristocrats as a class. Falstaff would be more likely to cause a breach of the peace than the Earl of Essex.

Mr. L. Dee Mallonee writes on '*The Growth of Custom into law.*' He finds that custom does not to-day exercise so much influence on law as in time past. Year by year legislation encroaches upon the space formerly occupied by custom; and the place which custom might have come to fill is preempted by legislation. Hence it may be said that custom is not now a primary source of law. But that does not mean that it is not an important element of law. Custom by entering law through legislation and principle becomes an important element thereof; and a large element of the rules that determine daily conduct.

We take the following from April Law Notes which is always brightly written, and maintains its cheerful level in spite of the heavy drain which, we have no doubt, the war has made on its staff:—

'Mr. Justice Darling has been summing-up to a jury in characteristic vein. "Counsel asked them,' he said, "to believe it because it was so extraordinary. He was sorry to deprive counsel of the credit of discovering that argument, but there was another philosopher who had anticipated it, and said '*Credo quia impossible.*' He had heard of one philosopher saying that, but never of twelve. The jury were men of the world, though as the case dragged on, they nearly became men of the next world." But is that "judgment of his peers" which is an Englishman's right (if not by Magna Charta, at any rate somehow), a right to be tried by a jury of twelve philosophers? Isn't it rather a right to be tried by a jury of twelve 'men out of the street'? If not, and if the sacred twelve are all to be philosophers, we quite understand why Lord Hugh Cecil does not consider that between trial by a jury and trial by Court martial the choice is so absolutely clear in favour of the former.'

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The Law Times for April 17th has a note on *Accidents on Tenement Staircases.* See p. 422 *supra.*

The Solicitors' Journal and Weekly Reporter for March 27th discussed *Some Recent Trade Mark Cases.* The Courts have recently gone very far in relaxing the former rule against the registration of names, and we are not sure that the question is not being decidedly complicated. In the issues of April 3rd and 10th there are Articles on *Emergency Legislation of Germany.*

In the Canada Law Journal for April, Mr. Fraser Raney continues his thesis on *Marriage and Divorce in Canada.* Parts II. and III. dealing with Capacity for Marriage, Circumstances rendering the Marriage Void, Circumstances rendering the Marriage voidable, The Marriage Ceremony and Registration of Marriages are given. Mr. Geo. S. Holmsted, K.C., who has made this subject his own, writes a letter on the subject and a reply is made by Mr. W. E. Raney, K.C. There is a note on *The Carrie Davis Trial* with which we must say that we decidedly agree. The case was one strongly inviting public sympathy; but as such was a subject for Executive action.

In the current number of the University of Pennsylvania Law Review Mr. John Stokes Adams of the Philadelphia bar has a clearly written review of the American cases on the *Right of a Land Owner to Oil and Gas in his Land.* The controversy which has caused a division of opinion is the question whether oil is to be treated as a mineral or as a fluid like water and so not the subject of property except while in actual occupancy. In spite of a difference in cases on this point some things are clearly established under the American decisions. It is established that by boring a well or causing a well to be bored upon his land the land owner becomes the owner of all the oil which may be brought to the surface through this well; and although a stranger at his own labour and expense takes oil from this well it is nevertheless when brought to the surface the property of the land owner. It is established that if oil or gas escape by its own force from such a well, one who is not the land-owner but who is law-

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fully in possession of the land may appropriate it, and upon such appropriation it becomes his property. It is likewise established that the land-owner has a right to an unlimited production through the well which has been sunk upon his land and in the exercise of that right he may diminish or exhaust the supply of the wells of his neighbours and conversely the exhaustion or diminution of his supply by operations upon other lands does not, standing alone, furnish him any ground of legal or equitable redress. One of the leading cases is that of *Westmoreland Natural Gas Co.* v. *DeWitt*,[1] where Mr. Justice Mitchell said, in language which has been considered classical in the United States,—"Water and oil and, still more strongly, gas may be classed by themselves, if the analogy be not too fanciful, as minerals *ferae naturae*. In common with animals and unlike other minerals they have the power to escape without the volition of the owner. They belong to the owner of the land and are part of it so long as they are on or in it, and are subject to his control; but when they escape and go into other lands, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining or even distant owner drills his own land and taps gas so that it comes into his well, and under his control, it is no longer yours but his." This rule has been adopted in the Supreme Court of the United States and in all the States of the union except in West Virginia and Kansas. The Courts of these States have held that the owner of undeveloped lands owns and has a right of property in the oil or gas which may be in or under his land, for reasons explained in the Article. Guided by Mr. Adams' reasoning, and the cases which he cites we arrive at the conclusion that the land-owner's right being only a right to explore and appropriate, he may transfer this right either as an appurtenance to the conveyance of an interest in the land, or without conveying any interest in the land. Those instruments which effectuate the former purpose are true leases, that is of the land. Those instruments which accomplish the latter purpose are grants of incorporeal hereditaments, licenses and options.

In the same Number of the University of Pennsylvania Law Review, Mr. Samuel Rosenbaum continues his interest-

[1] (1889) 130 Pa. 235.

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ing *Studies in English Civil Procedure.* This month he treats of the five hundred amendments to the Revised Rules of 1883. For convenience they are classified according to their character rather than their origins, and fall roughly into five or six general categories. The most striking of these categories, though not the most numerous or the most weighty in its content is that which contains amendments made for the purpose of counteracting various judicial decisions in the Supreme Court and of the House of Lords. Mr. Rosenbaum gives examples and is struck by the manner in which a quasi-legislative body, composed of eight judges, two barristers and a solicitor, is enabled to alter the law of the land as it has been declared by the highest tribunal in the Empire. Of the other five categories the one of most consequence is that containing amendments which create new departures in procedure. Among these is mentioned the abolition of the plaintiff's former right to choose the place of trial. The Master is now the person who fixes the place of trial. This is a further development of the tendency to take the control of litigation out of the hands of the plaintiff and to repose it entirely in the Court. Not all the Rule Committee's innovations meet with whole-hearted support as the following episode will bear witness. In order that a defendant, who had paid money into Court, which had been refused by the plaintiff may not be prejudiced by the fact of such payment, a rule was passed in 1893 stipulating that 'No communication to the jury shall be made until after the verdict is given, either of the fact that money has been paid into Court, or of the amount paid in.' In consequence of this rule if counsel mention to the jury either that money has been paid in or the amount, the judge will, in ordinary cases, stop the trial, discharge the jury and make such order as to re-trial as he thinks proper. Lord Russell of Killowen, however, had scant sympathy with it. In two cases before him he not only refused to recognise it, but himself told the jury how much had been paid in, and in one of those cases he did not hesitate to express the opinion that the rule was "foolish and inconvenient." In the third category, in which the amendments since 1883 are placed, we see more plainly how nearly legislative the powers and functions of the Rule Committee are. This category is composed of rules issued in connection with specific Acts of Parliament in which spe-

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cial duties are thrown upon the Supreme Court. The various Finance Acts are an example. Parliament has provided an admirably simple means through which dissatisfied persons can obtain judicial reviews of decisions by the officials who administer these Acts; instead of the Continental method, which is to creat separate administrative Courts, or the American method, which is to send appeals to the Executive head of the Department. In England the Acts very briefly provide that aggrieved persons may in certain specified cases, appeal to the High Court under rules to be prescribed by the High Court for that especial purpose. Other Acts throwing heavy responsibility on the High Court are the great Trustee Act of 1893, and the Companies (Consolidation) Act of 1908. The latter refers to the High Court for decisions, nearly all the questions which in American States are brought before such Administrative Tribunals, such as Commerce and Public Service Commissions. The fourth category deals with the duties and powers of Officials of the Court, the Fifth altering the time within which different steps in litigation may be taken, and the Sixth with the subject of costs. We must refer our readers to the Article itself for discussion of these amendments. We note that the concluding sections of Mr. Rosenbaum's article will be published as follows,—Section XVI. in the Law Quarterly Review for April; Section XVII. and XVIII. in the Journal of the Society of Comparative Legislation; Section XIX. has already appeared in the Law Magazine and Review for February, 1915, and has been noticed by the CANADIAN LAW TIMES.

Mr. Albert Bowles has an article in the same number of the University of Pennsylvania Law Review on the *Discharge of Liens by Judicial Sale in Pennsylvania.*

The current number of the Illinois Law Review contains articles of mainly local interest. Mr. C. N. Goodwin writes on *How should the Illinois Constitution be Amended?* He states that obviously the members of the Convention which provided the Constitution of 1870 cherished the sincere belief that wisdom would die with them, and that it was their special mission to save posterity from the conclusions of their probable folly. This was evidenced by rigid provisions for

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the most minute details of Government, by fettering to a most exasperating degree the power of the General Assembly to enact such remedial legislation as changing conditions might demand, and by making the amending of the instrument itself a matter of the greatest difficulty. Mr. Goodwin is mainly concerned with the question of whether the amendment should be carried through by constitutional convention or amending clause; and this question is treated by Mr. W. F. Dodd in the next article *Constitutional Convention or Amending Clause?* Mr. Frederick Ullman, junior, discusses the *Constitutionality of the Appellate Procedure Provided in the Municipal Court Act.* This number of the Review also contains *Announcement Number 2 of the Legal Ethics Clinic of the New York County Lawyer's Association,* an Association to which we have referred *supra* pp. 369-370.

In the current number of Yale Law Journal Mr. Oscar Ross Ewing writes on *The New Legal Justice.* He looks forward to the time when it can be said that individualistic philosophy no longer animates the Common law. He states that for years philosophers, economists and sociologists have insisted that an individualistic philosophy is inadequate for the needs of modern society. Individualism was embodied in our law during a period of economic democracy. It was designed to protect the lives and liberty and property of men from arbitrary interference by a tyrannical oligarchic Government, but to-day the situation is reversed. We have a democratic Government and a tyrannous economic oligarchy. To-day legislatures attempt to protect men from the outrages of this economic oligarchy, but the shield which the common law set up to defend men from arbitrary action by the Government is now invoked to shield the economic oligarchy from regulations by the Government in the interests of society. Common law individualism created for the protection of the people has become the instrument of their oppression. However, Mr. Ewing does not anticipate a change in the twinkling of an eye, and he concludes his article with the remark that "at the present time the new judicial theories cannot be said to have received general assent."

Mr. Albert H. Putney, discusses the *Five to Four Constitutional Law Decisions,* and treats the most important of

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these cases in the Supreme Court of the United States. Among these are the *Prize cases*;[2] *Hepburne* v. *Griswold*;[3] *United States* v. *Trans-Missouri Freight Association*,[4] the *Slaughter House Cases*,[5] and *The Insular Decisions* which fill the greater part of the 182nd volume of the United States Supreme Court reports.

Mr. R. W. Withers writes on *The Legality of So-Called 'Business Insurance.'* The first question which presents itself to the mind is whether such insurance is valid, that is whether there is that insurable interest which the law requires. He discusses first, corporation insurance, and concludes that it is entirely legitimate for a corporation to take out insurance on the lives of its officers or employees in every case where the death of such officer or employee would probably cause a financial loss. He touches on creditors' insurance and also on partnership insurance. The last mentioned form of insurance seems to have had its origin in the days of the California Gold fever. It was common for a person who remained in the East to send an argonaut into California, equip him, advance him money, agree for a share in any possible discoveries of gold, and then to make himself safe, by taking out insurance on the prospector's life. After reviewing the cases Mr. Withers comes to the conclusion that they are strong and practical reasons for holding partnership insurance to be valid, and that it is desirable as a prudent business investment.

Mr. Herbert J. Friedman, discusses *The Trust Problem in the Light of Some Recent Decisions.* He takes as his text the alleged expression of public dissatisfaction with the decision in the *International Harvester* case; and finds that because of a change in public opinion the Courts have recently been less willing than before to dissolve combinations. He discusses the two reasons which animated the Court to hold that the International Harvester Company was illegally organized and concludes that public opinion has repudiated them, and has now become opposed to a dissolution of large

[2] 2 Black 635.
[3] 8 Wall. 603.
[4] 166 U. S. 290.
[5] 16 Wall. 36.

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business units unless the people at large have been harmed by unfair prices or methods.

In the April number of the Columbia Law Review Mr. W. F. Dodds writes on *Political Safeguards and Judicial Guarantees.* Political safeguards are safeguards of which judicial enforcibility does not constitute an essential element. They may, for convenience, be grouped as follows,—Suffrage limitations, Upper House, checks and balances of government, such as an arrangement that each law shall have the approval of two houses and of the executive, a referendum, guarantees in a written constitution where such guarantees are not judicially enforceable. These are the safeguards which British communities prefer to confine themselves to. In the United States these are supplemented by judicial guarantees or constitutional limitations of the Legislature enforcible by the Courts. Mr. Dodd concludes an interesting article by a comparison of the two kinds of guarantees.

Mr. Russell T. Mount discusses *Prize Cases in the English Courts arising out of the Present War.* He treats of *The Chile;*[6] *The Marie Glaeser;*[7] *The Tommi* and *The Rothersand,*[8] and *The Roumanian,*[9] and touches on the controversial point, whether a British corporation consisting entirely of alien stock holders may own a British ship under sec. 1 of the Merchants Shipping Act, 1894.

The Central Law Journal has an article by Alvin Wagganer on *Some Legal Notions of Mark Twain.* Twain was early introduced to the law for his father and his brother Orion both practised law. It was with Orion that Twain made the memorable overland stage journey to Nevada. The passengers were each restricted to twenty-five pounds of baggage, and Twain, who found the usual amount of humour in this seeming prosaic fact relates that "my brother took along about four pounds of United States statutes, and six pounds of Unabridged Dictionary." During the trip the migrating humourist "read law." He lay back on mail-sacks, smoked his pipe luxuriously and "had many an excit-

[6] [1914] P. 212.
[7] [1914] P. 248.
[8] [1914] P. 251.
[9] [1915] P. 26.

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ing day subsequently, reading the statutes and the dictionary and wondering how the characters would turn out." Twain's books abound in jibes. He was never done praising the jury system as the "palladium of our liberties." He is not quite sure what a "palladium" is. He thought the American jury system "superior to any in the world," and assured an English audience that its efficiency was "only marred by the difficulty in finding twelve men every day who don't know anything and can't read." He was likewise lost in wonder over "the insanity plea that would have saved Cain."

Central Law Journal for April 16th contains a paper on the *Status of Employees while Riding in Employer's Conveyance.*

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THE INNS OF COURT RESERVE.

(From Solicitors' Journal and Weekly Reporter).

We're none to gay in the Law, good sooth!
But some who are past their prime,
They've found a bit of their long-lost youth,
They're having a rare old time.
In an altered world, that is touched to-day
By the gleam of a brighter sun,
We flock to the drill like boys to play
When the master's job is done.

It's like old times on the old parade
When we hear a sergeant storm,
For many of us have worked and played
In the Old Queen's uniform;
And now we've found in her grandson's day
A gift which the gods have brought,
And, work or play, we are boys in grey,
With the badge of the "Inns of Court."

There's little bite in a rasping tongue
As we spring to the sergeants' shout,
For it makes an elderly man feel young
When the zealots lay us out.
The same old bark and the same old frown
That we knew in the years agone;
We're meeker than mice when they dress us down,
But we talk to them later on.

We drill to-day in the cloistered shrine
Where the Templars drilled of old,
By "Number Five" of the poet's line (*a*),
And the flags where the Benchers strolled;
For company-drill, when the numbers come
And we muster a full parade,
We march to the quad that was Bacon's home,
Or the gardens that he made.

We're men who fought in the battle-line
When Kruger's flag went down,
We've Mr. Punch who helped to twine
A laurel for their crown (*b*);
He's free of the craft, as we most of us are,
And we touch from its furthest poles:
Here's Romer doing a bit for the Bar,
And next to him, "Mr. Vholes."

We're not the Guards, and we know the same;
We're fully alive to our "nots,"
But we're all of us awfully keen at the game,
And we're most of us passable shots.
There's room for recruits, so I sing this song—
It's not too late to begin,
And I say to the crocks who are hale and strong,
FALL IN! FALL IN! FALL IN!

CHRISTIAN TEARLE.

(*a*) King's Bench Walk—
"To Number Five direct your doves,
There spread round Murray all your blooming loves."—Pope.
(*b*) Sir Owen Seaman, platoon-commander.

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NEW BOOKS AND NEW EDITIONS.

Butterworths' Twentieth Century Statutes (Annotated), vol. X. Containing the *Public General Acts* passed in the year 1914, excluding Acts in force only in Scotland and the Isle of Man, issued under the general editorship of H. H. King, Esq., of the Inner Temple, Barrister-at-law. London: Butterworth & Co.

The tenth volume of this well-known series is specially interesting as containing the Irish Home Rule Bill which has now passed into Law, with what results remains to be seen. It includes the Prize Court and War Emergency Legislation to which we devote an Article in the present number, and the Bankruptcy and Insolvency Act 1914, which repeals and replaces the existing Bankruptcy Acts, and which is of special interest in view of the movement which we understand has been taken up by the Canadian Bar Association for the re-enactment in Canada of Bankruptcy Legislation. At present we have none as everybody knows save in relation to incorporated companies. It also contains the Criminal Justice Administration Act 1914, which in like manner repeals and replaces existing Acts relating to that subject, and the Merchants Shipping (Convention) Act 1914, which has been passed to give effect to the International Convention for the safety of life at sea signed in London on January 20th last. We may extract as a specimen of the notes that which is appended to s. 8 (2) of the Home Rule Bill,—or to give it its proper title,—the Government of Ireland Act 1914, which enacts that the election of Senators shall be 'according to the principle of proportional representation, each elector having one transferable vote.' The main principle of this provision is declared in the note to be as follows:—

'The exact mode of applying this principle will depend upon the regulation made by Order in Council. The main principle would be as follows:—The province of Ulster is a separate constituency for the election of 14 senators (see sub-s. (1) *supra.*) Each voter in that province would have before him a list of candidates of whom he would place 14 in the order of his choice. Assume the number of voters in Ulster to be 140,000; it is clear that any candidate who is placed first by more than 10,000 voters must be elected. The names of those so elected having been removed, the next to be elected would be the candidate thus left at the head of

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the largest number of voting papers; the process being repeated until the whole 14 senators are elected. The effect would be that a voter, whose first choice is elected by a large majority or is not elected at all, can afford some support to his second and subsequent choices. The above is based on the explanation of the system in Anson's Law and Custom of the Constitution, 4th ed., vol. 1, p. 143; but it does not seem to give full effect to the provision that each elector has but "one transferable vote." On the other hand, if, in order to give effect to that provision, as each candidate is elected the voting papers on which he is named first are removed, the system might become unworkable, e.g., if the first places on all the voting papers were distributed between less than 14 candidates. If, however, "one transferable vote" means "one vote for each vacancy, to be filled," the difficulty last mentioned does not arise.'

The Law of Arrest in Civil and Criminal Actions, by Harvey Cortlandt Voorhees, of the Boston Bar. Second Edition. Boston. Little, Brown and Company, 1915.

Ten years have elapsed since this neat little handbook on the Law of Arrest, or as the author also puts it "on personal liberty and the restriction thereof by due process of law" made its first appearance. The author tells us in his preface, and one may well believe it, that—'During that period it has attained a position as a *vade mecum* on the Law of Arrest, and is now in common use in police departments and law office, wherever English and American law forms the basis of Jurisprudence.' The book is, as we have already indicated, published in a most attractive form. The authorities cited are, of course, almost exclusively American, and comprise about 1,400 citations. The material seems to us very well arranged, and the subjects treated of are—The Right of Personal Liberty, The Issuance and Service of Legal Process, Who may Issue a Warrant, What Constitutes an Arrest, Arrest with Warrant, Arrest without a Warrant, Breaking Doors to make an Arrest, Force in the Act of Arrest, Disposing of the Prisoner, Arrest in Extradition Proceedings, Evidence Necessary to Establish the Offence, Exemption from Arrest, False Imprisonment, Trespass.

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The Rules and Practice before The Parliament of Canada upon *Bills of Divorce*, by Robert Victor Sinclair, K.C., of Osgoode Hall, Barrister-at-Law. Toronto: The Carswell Company, Ltd.; London: Sweet & Maxwell, Limited, 1915.

We will introduce this little book by the following extract from the statement of its author in his preface:—

'In the following pages an attempt has been made to supply a long-felt want. The changes in divorce practice since the publication of Gemmill on Divorce have rendered that excellent work practically obsolete. It is hoped that the notes to the Rules will be found sufficient to enable the practitioner to avoid difficulties which frequently arise in the prosecution of an application for divorce.'

Constitutional Law of England, by Edward Wavell Ridges, of Lincoln's Inn, Barrister-at-Law. Second Edition. London: Stevens and Sons, Limited.

We have also received the above work and we hope to notice it more at length in a future number.

Canadian Criminal Procedure as the same relates to Preliminary Hearings, Summary Convictions and Summary Trials, with an appendix of forms, compiled by The Hon. T. Mayne Daly, P.C., K.C., of the Manitoba Bar, Police Magistrate, Winnipeg. Second Edition, by George Patterson, K.C., of Winnipeg. Toronto: The Carswell Company, Limited; London: Sweet & Maxwell, Limited, 1915.

We are glad to welcome a second edition of this guide to those parts of the Criminal Code which relate to, or bear upon Procedure before Justices of the Peace and Police Magistrates. Over 500 English and Canadian cases are referred to in the notes with many citations from the judgments, and the book, we should imagine to be a valuable *vade mecum* to those practitioners who are concerned with such business.

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THE GAZETTES.

The Saskatchewan Gazette for March 31st, 1915, contains a proclamation by the Lieutenant-Governor in Council under chapter 2 of the statutes of the province for 1914, ordering and commanding the closing of all public bars and wholesale premises wherein intoxicating liquors are sold, and also ordering the discontinuance of the sale of liquors in club premises and dining cars operating in Saskatchewan at the hour of 7 o'clock p.m., upon every day upon which liquor may legally be sold in any such public bar or premises, such order to take effect on, from and after April 1st, 1915.

The British Columbia Gazette for April 1st, 1915, contains a Dominion Order-in-Council of March 13th last, which enacts that—'In view of the present overcrowded condition of the labour market in the province of British Columbia,' from and after April 1st, 1915, until after September 30th, 1915, the landing at any port of entry in British Columbia of any skilled or unskilled labourers is prohibited.

The supplement of the Manitoba Gazette of April 10th, 1915, contains the statutes passed during the session just concluded. We notice two Acts racy of the soil in the Crop Payments Act, which authorise agreements for payment of rent under leases or purchase money under agreements of sale, by the tenant or purchaser delivering to the landlord or vendor a share of the crops grown on the land, or the proceeds of such share, and exempting such agreements from the provisions of the Bills of Sale and Chattel Mortgage Acts as to registration; and an Act to enable municipalities to borrow limited amounts of money for seed grain purposes. There is also an Act respecting Stationary Engineers; and an Act respecting the taxation of theatres, dancing halls, film exchanges, film or slide exhibitors, and automatic vending machines. There is also a War Relief Act, which we notice elsewhere. For the rest, the enactments, of which there appears to be a goodly crop, seem all to be amendatory of existing statutes of the province, including the Act respecting contracts relating to land assented to on September 18th last, the Game Protection Act, the Good Roads Act 1914, and the Insurance Act.

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LOCALS AND PERSONALS.

Mr. E. F. Jones formerly of St. John, N.B., has been appointed city solicitor of Vancouver.

The City Council have, we understand, invited the Hon. J. B. M. Baxter, K.C., to act as city solicitor, on the basis of an annual retainer of $1,500, with extra payments to be made if he appears in Court. The Council is to be consulted in the event of Mr. Baxter not being able to appear in Court, as to his substitute.

Mr. J. Noel Beauchamp has been elected by proclamation to the presidency of the McGill Law Undergraduates Society. He is the McGill representative on the executive Board of the Young Conservative Association at Montreal.

The Chief Justice of Nova Scotia, Sir Charles James Townshend has retired from office after a lengthy and honoured career as chief of the Supreme Court Bench of the province.

We deem well worthy of notice in this column almost if not quite, the first appearance in the history of the Bar of Upper Canada of a lady lawyer as counsel in Weekly Court. This honour fell to Miss Jean Cairns on the 21st ult., who moved before Mr. Justice Hodgins in an opposed motion for an injunction, which was granted. We have it from those present in Court that Miss Cairns, whose name is a good omen of professional success, conducted her case in a very able manner. There can be no reason why in certain departments of legal practice women should not succeed, and every mere man, who is a man, will wish them every success in overcoming the handicap which their sex places them under in this and many other fields of work.

Mr. George C. Speers, lately connected with Bigelow and Graham, of Regina, has now commenced the practice of law on his own account at Cupar, Saskatchewan. He was Gold Medalist in law for 1913 at the University of Saskatchewan, and we wish him every success in his profession.

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We have noticed the lamented death of His Honour Judge Hughes, late County Judge of the County of Elgin, in another place. We, also, regret to have to record the following deaths among members of the legal profession which occurred during last month:—

Horace Faulconer Jell, late police magistrate of St. Thomas, on April 16th, at St. Thomas.

John Travers Lewis, K.C., D.C.L., senior partner in the firm of Lewis and Smellie, on April 12th, at Ottawa.

Michael Houston, often referred to as the Dean of the Chatham Bar, at Chatham, on April 11th.

Martin Honan, at Montreal, on April 11th.

Delos R. Davis, K.C., the first coloured man ever admitted to the Bar of Ontario, at Amherstburg, on April 13th.

Charles Samuel Keith, at New Westminster, B.C., on April 4th.

Peter McL. Forin, at Belleville, on April 19th.

Jean Jacques Bissonette, of Montreal, on April 19th.

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The Canadian Law Times.

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BY THE WAY.

We are proud to publish in a prominent place in our present issue the names of those barristers, solicitors, and students-at-law of the provinces of Nova Scotia, New Brunswick, Alberta, and Saskatchewan who are now on active service for King and Country. The Canadians already at the front have set a high standard to live up to,—or perhaps we should rather say, to die up to. Langemarck is a high mark. But no one doubts that, if the occasion again occurs, the gallant Canadian soldiers who have not already reached the scene of action will attain even to it.

The sudden death of Mr. E. E. A. Du Vernet, K.C., just as we are going to press, removes a very distinguished member from the legal profession. Effective in every direction, Mr. Du Vernet's strength lay especially in cross-examination of witnesses, addressing juries, and as a tactician and practical man of business. Without any of the adventitious aids of inherited wealth, he earned for himself a position of importance in the financial world, and was a director of the Union Bank and Union Trust Company, among other institutions. He possessed a personality which interested and attracted his fellowmen, and inspired confidence in clients. Like all truly good men, he was a keen golfer. In Mr. Du Vernet the maritime provinces may add another name to their long list of distinguished sons, although his legal career was entirely in Ontario.

In connection with Mr. Silas Alward's Article in our present number on the 'Evolution of English Parliamentary

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Government,' we may refer to an interesting leader in the London *Spectator* of May 1st last, in which the writer deplores the fact that the notion of individual responsibility of Ministers, as contrasted with the collective responsibility of Cabinets, has been gaining ground in the last ten years. There has been a marked tendency of late, he alleges, among the critics of the Ministry to give support to this dangerous view of individual rather than of collective responsibility by levelling their criticism by name at the heads of special Ministers personally responsible for the action taken by their departments. He instances the criticism which, fairly or unfairly, has been levelled against Mr. Winston Churchill lately because of the admitted mistake of beginning an attack on the Dardanelles with a purely naval force, and before the large land forces now in operation had been got together. The maintenance of Cabinet responsibility, that is, the responsibility of the Cabinet as a whole for the acts of individual Ministers is, the writer maintains, of the utmost importance for the welfare of the nation. If the rule of collective responsibility is properly enforced by the nation, a Minister's colleagues will feel that they have a right to demand information as to what is going on, and to express their opinion upon every great act or policy before it is put into operation; whereas the colleagues of a Minister who is solely responsible for his own acts do not trouble to exercise control over him. No doubt the increased size of Cabinets at the present day creates a difficulty; but that increased size has led to the growth—or revival—of an institution known as the Inner Cabinet. The Prime Minister and Inner Cabinet can act, as it were, as trustees for their colleagues. A Minister should at least secure the endorsement of the Prime Minister and Inner Cabinet before taking action, and it may be assumed that the rest of his colleagues will at any rate endorse the initial action. The public, the writer insists, will never obtain proper control of their affairs if they once abandon the safeguard of collective Cabinet responsibility, and allow individual responsibility to be substituted for it. If once Governments are made to feel their collective responsibility, we shall get Ministerial supervision. Without it we shall get none. The House of Commons, owing to the extremity of the party system, has become utterly incapable of controlling the persons to whom it delegates national affairs. Unless

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the Cabinet control their members, it becomes a case of mere "go as you please."

The assurance given by Mr. Louis Harcourt, Secretary of State for the Colonies, in January last, when intimating to the Dominions the postponement of the Imperial Conference, which was made public on April 14th last in answer to a question in the House of Commons by Sir Gilbert Parker, is well worth putting on record in these pages. The Colonial Secretary said:—"It is the intention of His Majesty's Government to consult him (the Prime Minister of each Dominion) fully, and if possible personally, when the time arrives to discuss possible terms of peace." This is interesting as marking an advance in the development of the Constitution of the Empire which if it is to be made firm and lasting and safe must be, like that of Great Britain, a *growth* and not a *fabric*. In the great gathering held at the Guildhall in London on May 19th last to set on record—'The abiding gratitude for the unparalleled services rendered by the overseas Dominions in the struggle to maintain the ideal of liberty and justice which is the common sacred cause of the allies,' in acknowledging the resolution on behalf of Canada, Sir George Perley said:—"The announcement that the Dominions will be consulted before terms of peace are arranged produced a splendid impression in Canada. Our people would no doubt have been disappointed if such a course were not followed." Now it is suggested by Sir Lawrence Gomme, formerly Chief Clerk of the London County Council, in a letter to the Daily Telegraph, that the Coalation Ministry ought to be an Empire coalition of organizing statesmen, and he specially singles out Premier Botha of South Africa to work with Lord Kitchener. We are getting accustomed to novelties and new departures in these days, but this fairly takes one's breath away.

The British North America Act, 1915, amending the British North America Act, 1867, by authorizing the addition of nine additional members to the Senate received the Royal Assent on the 19th ult. An Imperial Act was obviously necessary because the only provision in the British North America Act permitting additional members to be added to the Senate is s. 26 which enacts:—'If at any time on the recommendation of the Governor-General the (King) thinks fit

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to direct that three or six members be added to the Senate, the Governor-General may by summons to three or six qualified persons (as the case may be) representing equally the three divisions of Canada, add to the Senate accordingly.' Whatever may have been in fact the origin of this provision, which is perhaps the only one in which the analogy of the British Constitution was not followed as much as possible by the framers of the Act, it is at least curious that by the Peerage Bill of 1719 it was proposed that the King should be allowed to make six new peers, after which new creations should only take place on the extinction of existing peerages. The Bill was rejected. The successful attempt of Queen Anne and Her Ministers in 1711 to pack the House of Lords by the creation of twelve new peers, and so secure a majority for the Parliamentary approval of the Peace of Utrecht was, as Sir William Anson tells us, probably the ground of this proposal.

The Law Journal of April 24th, 1915, in reference to the 'war babies' problem says:—"Whatever view be taken on the difficult question of altering the legal status at present accorded by law and public opinion alike to illegitimate children—a question which has become of special importance in the particular case of soldiers' illegitimate children—there is one point on which there will be a general consensus of legal opinion. Where the parents of such a child subsequently intermarry there seems no just reason why the status of legitimacy should be refused to their previous offspring. The refusal, indeed, is peculiar to the Common Law of England and Ireland; in the rest of Christendom, as in Scotland, the doctrine of *legitimatio per subsequens matrimonium* is universally adopted. The Canon Law and the Civil Law recognize this principle; but 'once a bastard, always a bastard' has been the immemorial rule of our Common Law." In truth our law on the subject is sufficiently absurd. If a child be born half an hour before the parents marry it is legitimate; if it be born half an hour after the parents marry, it is illegitimate. The fact that in the thirteenth century the Barons of England refused to alter the common law on the point, and appended to their refusal the high-sounding absurdity *Nolumus leges Angliæ mutari,* is no reason why we should still persist in the same attitude to the prejudice of countless generations of innocent children.

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The *Law Notes* for May contains a paragraph commenting on Sir Edward Clark's severe article on Sir Henry Hawkins in the *Cornhill Magazine*. After agreeing with Sir Edward's criticism the *Law Notes* proceeds to say that a correspondent has sent a personal reminiscence of the late Sir Henry Hawkins which goes far to justify the attack. The correspondent writes: "I remember being before him in one case in which Sir Robert Finlay and a junior were for my client. The leader being away, the junior was bullied and browbeaten in a most shameless manner for half an hour, when Sir Robert was sent for. There was not one further comment from Sir Henry. The contrast was remarked by many—half an hour of bullying and scolding, then comparative silence. I observed the same procedure frequently in his Court—the browbeating of juniors who could be browbeaten, and the fear of resolute leaders. Of course, there was ability, well fortified by a good memory and a considerable amount of insolence and effrontery." It has been suggested to us that Ontario possesses its own Sir Henry; and that many of the younger members of the Bar would be able to point him out. At all events complaint is laid that not unfrequently members of the Bar have been prevented from laying their cases before the Court by an attitude of criticism and interruption which is wholly at variance with what might be expected from the Bench. A judge, our informant declares, does not prove his greatness by baiting those who have neither the position nor the experience to stand up to him.

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LIST OF BARRISTERS, SOLICITORS, AND STUDENTS-AT-LAW NOW ON ACTIVE SERVICE FOR CANADA AND THE EMPIRE, FROM THE PROVINCES OF NOVA SCOTIA, NEW BRUNSWICK, ALBERTA, AND SASKATCHEWAN.

Nova Scotia.

Alister Fraser, New Glasgow; J. W. Margeau, Bridgewater; J. L. McKinnon, Halifax; M. A. McPherson, St. Peters; L. E. Ormond, Amherst; H. H. Pines, Waterville; W. P. Purney, Liverpool; J. E. Read, Halifax; D. C. Sinclair, New Glasgow; J. M. Slayter, Halifax; S. G. Robertson, Westville; W. E. Thompson, Halifax.

STUDENTS-AT-LAW.

E. C. Phinney, Bear River; J. H. T. Nicholson, Sydney Mines; D. D. McDonald, Bailey's Brook; E. A. Chisholm, Havre Foucher; H. R. St. C. Jones, Weymouth; C. T. McLeod, New Haven; William Noblett, Halifax; J. O. Stairs, Halifax; G. D. Young, Millsville; Kenneth Gray, Pictou; J. R. H. Harley, Windsor; J. K. McKay, Pictou; W. T. Ruggles, Middleton.

New Brunswick.

Hugh H. McLean, K.C., C. Herbert McLean, Cyrus F. Inches, W. Henry Harrison, Edward C. Weyman, Herbert J. Smith, Charles F. Sandford,—all of St. John; Harry F. McLeod, K.C., and Percy A. Guthrie of Fredericton; Arthur Neville Vince, and E. Kenneth Connell of Woodstock; George R. McCord of Sackville; A. Ernest G. McKenzie of Campbellton; and Isaac C. Spicer of Chatham.

STUDENT-AT-LAW.

Horace Hume Vanwart of Fredericton.

Alberta.

BARRISTERS AND SOLICITORS.

Stanley Livingstone Jones, K.C., (Lieut. Princess Patricia Regiment), Calgary; Daniel Lee Redman, (Lieut.

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10th Battalion), Calgary; Geoffrey Grant Lafferty, (Lieut. Lincolnshire Battalion), Calgary; Reginald Stewart, (Major, 31st Battalion), Calgary; William Antrobus Griesbach, (Lieut.-Col., 49th Battalion), Edmonton; Frederick Charles Jamieson, (Major), Edmonton; Charles Arthur Wilson, Edmonton; George Thorold Davidson, Medicine Hat; Ivor Stanley Owen, Medicine Hat; James Hampton Brown Will, Athabasca; Arthur Charles Kemmis, (Lieut.-Col., 13th Mounted Rifles), Pincher Creek; William Hector McLelland, (Lieut., Artillery), Lethbridge; Robert Fulton Barnes, Macleod; David Christie Black, (Army Service Corps), Calgary; Brian LeRoy Cooke, Lloydminster; Henry Seymour Tobin, (Lieut.-Col., 29th Battalion); Henry Squires Steele.

STUDENTS-AT-LAW.

W. Roberts Lister, Edmonton; Stanley Harold Kerr, Edmonton; Herbert Austin Beck, Edmonton; Rowan Purdon Fitzgerald, Edmonton; Humphrey Burnett Phillips, Edmonton; Alfred Koch, Edmonton; Charles Yardley Weaver, (Capt. 'A' Company, 49th Battalion, C. E. F.), Edmonton; James Christian Lawrence Young, Edmonton; Desmond St. Clair George, (Corp., 31st Battalion), Red Deer; John Francis Costigan, (Capt. 50th Battalion), Calgary; John Francis Proctor, (Capt. 50th Battalion), Calgary; Joshua Stanley Wright, (Adjt. 50th Battalion), Calgary; Arthur Gardner Lincoln, (Capt. 'A' Squadron, 13th Mounted Rifles), Calgary; James Hugh Campbell, (Lieut. 'B' Squadron, 13th Mounted Rifles), Macleod; Ernest Frederick John Vernon Pinkham, (Capt. 31st Battalion), Calgary; Ross Malford Sherk, Olds.

Saskatchewan.

John Muir (Broatch, Lennox, Muir & Co.), Moose Jaw; Peter McLellan (Archer & McLellan), Arcola; M. A. McPherson (Buckles, Donald & McPherson), Swift Current; Norman Gentles (Seaborn, Taylor, Pope & Quirk), Moose Jaw; A. W. Goldsworthy (with O. D. Hill), Melfort; Robert M. Cunningham (Murray & Munro), Saskatoon; Harold E. Hartney (Russell Hartney), Saskatoon; Archibald McLean, Kerrobert; Alexander Ross, K.C., Regina; Maughan McCausland (Wood & McCausland), Regina; William S. Walker, Battleford; J. F. L. Embury, K.C., Regina; F. B.

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Goodwillie, Melfort; Russell A. Carman, Balgonie; F. B. Bagshaw (Anderson, Bagshaw & Co.), Regina; Alister Fraser (Knowles, Hare & Benson), Moose Jaw; Austin S. Trotter, Melville; George C. Thomson, Swift Current; John Munro (Murray & Munro), Saskatoon; William A. Reeve, Qu'Appelle; F. G. D. Quirk (Seaborn, Taylor & Co.), Moose Jaw; E. M. Thomson (Torney & Thomson), Moose Jaw.

STUDENTS-AT-LAW.

W. B. O'Hare, Regina; Ernest J. Straker, Moosomin; Charles A. Scott, Saskatoon; Ronald W. Pearson, Saskatoon; Alfred G. Styles, Regina; Herbert Olding, Saskatoon; Roy E. Murray, Weyburn; C. B. McGregor, Weyburn; John Einarson, Yorkton; T. M. Walsh, Yorkton; V. O. Lackey, Moose Jaw.

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THE EVOLUTION OF ENGLISH PARLIAMENTARY GOVERNMENT.

"The invisible point of yesterday becomes the goal of to-day;
And in turn is the starting-post of the morrow."

A great author, on Roman Civil Law, observes,—"The *Corpus Juris Civilis* stands at the goal of the history of Roman Law, summing up the results of the whole development of the law during the preceding thousand years; and, at this time, it is the starting point and basis of modern law."

With equal propriety may it be said of English Constitutional Government,—"The Bill of Rights of 1688, supplemented by the Act of Settlement of William III., (1700 and 1701) stands at the goal of statutory English Constitutional history and is the starting point and basis of modern English Constitutional Government."

On the death of the last of the Stuarts, in 1714, and at the commencement of the succession of the reign of the House of Hanover, a new era opens, and for two hundred years there has been witnessed the rapid growth of the unwritten constitution of Great Britain.

The absurd doctrines of Divine Hereditary Right, of absolute Royal power, and of the Passive Obedience of the subject had passed and forever, and henceforth commenced the growth, by the side of the great legal Codes hitherto secured, of Parliamentary government through a Cabinet Ministry responsible to the members commanding a majority in the House of Commons.

Hallam characterized the Act of Settlement as "the Seal of our Constitutional laws, the complement of the Revolution itself and the Bill of Rights, and the last great Statute which restrains the power of the Crown."

Three causes combined, after the Revolution of 1688 and the Act of Settlement (1700-1701), to hasten Parliamentary Government by means of the Cabinet system, on a settled and permanent basis.

The first was the marked division of the English people into two great parties, each contending for the control of the executive power of State—the Whigs and the Tories. For two hundred years these two great parties have struggled

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for political pre-eminence with varying success. Both William III. and Queen Anne were strongly averse to party government, preferring the selection of the ablest men from either side of party politics; yet it was under a Whig Ministry, during the reign of Anne, the last of the Stuarts, Marlborough won his brilliant victories over the French.

The second cause was owing to the personal character of the first two sovereigns of the House of Hanover, George I. and George II., who were completely under the control of the then dominant party—the Whigs. "The troublesome energies of Parliament," observes Sir Erskine May, "were an enigma to them; and they cheerfully acquiesced in the ascendancy of able Ministers who had suppressed and crushed pretenders to their Crown—who had triumphed over Parliamentary opposition, and had borne all the burthen of the government. Left to the indulgence of their own personal tastes—occupied with frequent visits to the land of their birth, by a German Court, favourites and mistresses—they were not anxious to engage more than was necessary in the turbulent contests of a constitutional government. Having lent their name and authority to competent ministers, they acted upon their advice, and aided them by all the means at the disposal of the Court."

The third cause favouring government by Parliament was, likewise, personal, being the skill and ability of Sir Robert Walpole, who had been Secretary of War in the Whig Ministry of Queen Anne and was Chancellor of the Exchequer in the early part of the reign of George I., and for the period of twenty-one years, from 1721 to 1742, held the office of Prime Minister without a break, during six years of the reign of George I. and fifteen years during the reign of George II. With consummate tact and great skill in the management of men, he so entrenched his party in power, that the Tories during the reign of George III., that stubborn reactionary sovereign, did not make much headway against the reforms already secured by the great Whig leader. One of the brilliant writers of the nineteenth century, Thackeray, thus lauds this skilful Minister,—"But for Sir Robert Walpole, we should have had the Pretender back again. But for his obstinate love of peace, we should have had wars, which the nation was not strong enough or united enough to endure. But for his resolute counsels and good-humoured

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resistance, we might have had German despots attempting a Hanoverian regimen over us; we should have had revolt, commotion, want, and tyrannous misrule in place of a quarter of a century of peace, freedom, and material prosperity, such as the country never enjoyed. . . . The days are over in England, of that strange religion of king worship, when priests flattered princes in the temple of God; when servility was held to be ennobling duty; while beauty and youth tried eagerly for royal favours. Mended morals and mended manners in Courts and people, are among the priceless consequences of the freedom, which George I. came to rescue and secure."

The Cabinet system as finally established, after the lapse of nearly one hundred years. may be briefly described as follows:—It is a responsible Executive under the leadership of a Prime Minister, consisting of a number of members, who are heads of several departments and members of either one of the two Houses of Parliament. These members are drawn from the party which commands a majority in the House of Commons. Collectively, they are responsible to the last named House for the administration of national affairs. The following are some of the characteristic features of the Cabinet, so called. Its members must hold the same political creed. Each minister acts in his own department as the recognized agent of his colleagues, whose concurrence he assumes. The idea of collective responsibility applies in their relations between the Cabinet and the King; in other words, the advice they tender the sovereign is their collective opinion. Strict secrecy is a marked incident of the meetings of the Cabinet. No record or minute of their meetings or proceedings is kept. The informal reports sent to the sovereign are strictly confidential and are not available for use for any other purpose. The members must also be members of the Privy Council. If the Ministry is defeated, on an important question, it places its resignation in the hands of the Crown or appeals to the Electorate. The Cabinet being a living organism, is constantly undergoing change, to meet the varied changes of time and circumstances. The informality of its proceedings has elicited much comment on the part of foreigners. Disraeli once said of it,—"That a Bill proposed by a Archangel in office would not conciliate an opposition in the majority." The head of the Cabinet

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is the Prime Minister. He has been called the "Keystone of the Cabinet Arch." The Prime Minister chooses his own colleagues, subject to the approval of the Sovereign. Walpole was the first Prime Minister in the modern sense of the term. There is no Act of Parliament compelling a member of the Cabinet to hold a seat in Parliament; but by unwritten law a Minister, who could not obtain a seat in the House of Commons or did not hold a seat in the House of Lords, could not continue to hold office for many weeks. The Prime Minister receives no salary; but as first Lord of the Treasury, he receives £5,000 per annum. The Lord Chancellor, who presides in the House of Lords, receives a salary of £10,000 per annum. The duties of the Prime Minister are many and exacting. He has the supervision of several departments; he takes an active and leading part in debate; he has to watch the general trend of public opinion and assist the other members of the ministry, if so required, in the discharge of their respective duties. He is supreme among his colleagues, both in their appointment and dismissal. If he cannot work satisfactorily with a particular Minister in the business of government, he so reports to the Sovereign. The King, under such circumstances, would ordinarily dismiss the recalcitrant minister. In matters of ordinary routine the Sovereign usually acts upon the advice of the Cabinet. While on the other hand, in matters of importance or in which a new departure of policy is proposed, it becomes the duty of the Prime Minister to inform the Sovereign fully and particularly on all points of the contemplated change. If the Sovereign refuses to accept the advice of the Cabinet, they then have to choose whether they will abandon the measure or tender their resignation. If the measure is one not materially affecting the best interests of the country they may yield to the opinion of the Sovereign or leave to him the opportunity of ascertaining whether he can find other servants who will accept his views. The following rule is laid down by Mr. Todd in his work on Parliamentary government in England:—"The right of a sovereign to dismiss his ministers is unquestionable; but that right should be exercised solely in the interests of the State, and on grounds which can be justified to Parliament. By the operation of this principle, the personal interference of the Sovereign in State affairs is restrained within appropriate limits. It is

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prevented from assuming an arbitrary or self-willed aspect, and is rendered constitutional and beneficent. The Sovereign cannot, indeed, impose a policy, either upon his Minister, or his Parliament, but he can dismiss his Minister, and he can appeal to the country against the judgment of Parliament. George III. was strictly within his rights when he dismissed the Coalition (both in 1784 and 1807). William IV. was equally within his rights when he dismissed Lord Melbourne, and appealed to the country. In these several cases a great question of policy was raised, and determined by competent authority. In the one case (or, rather, in the first two cases), the action of the King was confirmed by the nation; in the other, it was reversed. Everything was done constitutionally and in order."

Mr. Gladstone in his able article, in the North American Review, entitled "Kin beyond Sea," observes:—"It is a cardinal axiom of the modern British Constitution, that the House of Commons is the greatest of the powers of the State. It is to the House of Commons that every act of government, performed by responsible ministers in the name and on behalf of the Crown, must be explained and justified, and by them that it must be ultimately approved. And the sole appeal from the verdict of the House is a rightful appeal to those from whom it received its commission."

The following extracts taken from four great authorities afford the best definition of the unwritten constitution of England, accessible.

The first is that of Lord Macaulay. "The Ministry," says the popular historian, "is in fact, a committee of leading members of the two Houses. It is nominated by the Crown; but it consists exclusively of statesmen, whose opinions on the passing questions of the time agrees, in the main, with the opinions of the majority of the House of Commons. Among the members of this committee are distributed the great departments of the administration. Each Minister conducts the ordinary business of his own office without reference to his colleagues. But the most important business of every office, and especially such business as is likely to be the subject of discussion in Parliament, is brought under the consideration of the whole Ministry. In Parliament the Ministers are bound to act as one man on all questions relating to the executive government. If one of them dissents

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from the rest on a question too important to admit of compromise, it is his duty to retire. While the Ministers retain the confidence of the parliamentary majority, that majority supports them against opposition and rejects every motion which reflects on them or is likely to embarrass them. If they forfeit that confidence, if the parliamentary majority is dissatisfied with the way in which patronage is distributed, and the way in which the prerogative of mercy is used, with the conduct of foreign affairs, with the conduct of a war, the remedy is simple. . . . They have merely to declare that they have ceased to trust the Ministry, and to ask for a Ministry which they can trust."

The following description of the *modus operandi* of the "Cabinet," by Walter Bagehot, may prove, at least, interesting:—"The most curious point about the Cabinet is that so very little is known about it. The meetings are not only secret in theory, but secret in reality. The House of Commons, even in its most inquisitive and turbulent moments, would scarcely permit a note of a Cabinet meeting to be read. No Minister who respected the fundamental usages of political practice would attempt to read such a note. The committee which unites the law-making power to the law-executing power—which, by virtue of that combination, is, while it lasts and holds together, the most powerful body in the State—is a committee wholly secret. No description of it, at once graphic and authentic, has ever been given. It is said to be sometimes like a rather disorderly board of directors, where many speak and few listen—though no one knows."

That great parliamentarian, Gladstone, thus defines its powers:—"The Cabinet is the threefold hinge that connects together for action the British Constitution of King or Queen, Lords and Commons. Upon it is concentrated the whole strain of the Government, and it constitutes from day to day, the true centre of gravity for the working system of the State, although the ultimate superiority of force resides in the representative Chamber." And upon the Cabinet "it devolves to provide that the House of Parliament shall legally counsel and serve the Crown, and that the Crown shall act strictly in accordance with its obligation to the nation."

Upon the power of the Sovereign to dismiss his Ministry that great authority states:—"There is, indeed, one great

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and critical act, the responsibility for which falls momentarily or provisionally on the Sovereign; it is the dismissal of an existing ministry, and the appointment of a new one." Unconditionally entitled to dismiss the Ministers, the Sovereign can, of course, choose his own opportunity. He may defy the Parliament, if he can count upon the people. William IV., in the year 1834 (when he dismissed the Government of Lord Melbourne), had neither Parliament nor people with him. His act was within the limits of the Constitution, for it was covered by the responsibility of the acceding ministry."

The last is the greatest of all, for it is the matured judgment of a great Constitutional Sovereign, Queen Victoria. Writing to the Emperor Napoleon III., in explanation of the difference between the English and French system of government, the Queen remarked,—"I am bound by certain rules and usages. I have no uncontrollable power of decision. I must adopt the advice of a council of responsible Ministers, and these Ministers have to meet and to agree on a course of action, after having arrived at a joint conviction of its justice and utility. They have, at the same time, to take care that the steps which they wish to take are not only in accordance with the best interests of the country, but also such that they can be explained to and defended in Parliament, and that their fitness may be brought home to the conviction of the nation." In this system, her Majesty proceeds to point out, she has an advantage of which the Emperor of the French is deprived:—"I can allow my policy free scope to work out its own consequences, certain of the steady and consistent support of my own people, who, having had a share in determining my policy, feel themselves to be identified with it."

With respect to the prerogative right of a Governor of a British Colony to dissolve the House of Assembly without the advice of his Council, New Brunswick affords a striking instance, in the case of the Prohibitory Liquor Act of 1855. The Hon. Mr. Tilley, at the time a member of the Government and Provincial Secretary of the Province, as a private member, and not on behalf of the Government, introduced in the House of Assembly, and succeeded in carrying through the Legislature, an Act prohibiting the importation, manufacture and sale of intoxicating liquors. It was carried in

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the popular branch by the narrow majority of three. It went into operation on January 1st, 1856. Th result was what might have been expected under the circumstances. The attempt to enforce it proved a failure. Liquor was sold in all the two hundred taverns of the City and Portland as openly, after the law came into force, as before. Able lawyers were retained to interpose every objection that technicality or chicane could devise to thwart its enforcement. The law was set at defiance and the people made it a matter of boast. After the lapse of a few months it became apparent the Act had become inoperative, and incapable of enforcement. The Legislature had three years yet to run before its term would expire by lapse of time. The Hon. H. T. Manners-Sutton, the Lieutenant-Governor, sent a memorandum to his Ministers, in which he stated that a continuance of the existing condition of affairs was fraught with peril to the best interests of the community, and called for immediate remedy. He further suggested a dissolution of Parliament, with a view to an expression of public opinion in favour of, or in opposition to, its repeal. The Ministers dissented and would not advise a dissolution. Further correspondence ended with like result. The Lieutenant-Governor at length said he never contemplated a dissolution of the Assembly without the concurrence of responsible advisers. He claimed that the Executive Council should either assume the responsibility for the proclamation of dissolution or that they should retire, and enable him to seek other advisers. Ministers still refused to comply with the Governor's demand. The Governor then directed the Provincial Secretary to prepare and countersign a proclamation dissolving the Assembly. The Provincial Secretary acted accordingly and in a few days after the Ministry resigned. In nine days after the Governor succeeded in forming a new Administration, who, agreeing with him in the necessity for an immediate dissolution of Parliament, decided to assume responsibility for the same.

The election that followed was the most exciting and bitter ever held in the Province. The Governor was denounced in every mood and tense. His act was characterized as tyrannical, unjust, and contrary to the principles of Responsible Government. As a result the prohibitionists sustained an overwhelming defeat. The City and County of Saint John sent six members, opposed to prohibition and for

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the repeal of the Act. At an extra session of the Legislature, called immediately after, the Act was repealed in the House of Assembly, by a vote of 36 to 2, the late Hon. Judge Steadman and the Hon. R. A. McLellan, ex-Governor of the Province, voting for its continuance. Its repeal was carried by the unanimous vote of the Legislative Council. The conduct of the Governor was not only strictly constitutional, but evinced the sound judgment shown by his Honour in properly gauging public opinion, and in putting a termination to an unwise Act as soon as possible. The New Brunswick Legislature, during the session just closed, refused the passing of an Act, prohibiting the sale of intoxicating liquors, even for a temporary period, during the existing war, on the ground that public opinion had not sufficiently advanced to warrant the experiment.

In theory the King would seem to wield the powers inherent in absolute despotism. He is the source, or at least is so called, of honour and the fountain of justice; he summons, prorogues and dissolves Parliament; he appoints and dismisses Ministers; he receives, and holds, in law, the entire revenue of the State; he selects all great officers of Church and State; he declares war and proclaims peace; he makes treaties and administers justice; he pardons crime, or abates its punishment. And yet in practice every such act is done in conjunction with Ministers responsible for the act and its consequence. For all of these acts the Ministers are responsible to Parliament, and the Sovereign enjoys, in regard thereto, an absolute immunity from all consequences, under the well known maxim,—"The King can do no wrong." Regal right, by the Revolution of 1688, was expressly founded upon contract; and breach of that contract on the part of the King absolves the subject from all claims of allegiance. What might be the result, should the Crown attempt to usurp powers to which not justly entitled, is admirably emphasized by Gladstone, in 'Kin beyond Sea,' in the following terms:—"It would be an evil and perilous day for the Monarchy, were any prospective possessor of the Crown to assume or claim for himself final, or preponderating, or even independent power, in any one department of the State. The ideas and practice of the time of George III., whose will in certain matters limited the action of the Min-

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isters, cannot be revived, otherwise than by what would be, on their part, nothing less than a base compliance, a shameful subserviency, dangerous to the public weal, and, in the highest degree, disloyal to the dynasty. Because, in every free State, for every public act, some one must be responsible, and the question is, Who shall it be? The British Constitution answers: The Minister, and the Minister exclusively. That he may be responsible, all action must be fully shared by him. Sole action, for the Sovereign, would mean undefended, unprotected action; the armour of irresponsibility would not cover the whole body against sword or spear; a head would project beyond the awning, and would invite a sunstroke."

On the other hand, the Sovereign is not treated as a mere instrument, an automaton, moved as he is moved. The King receives and exacts, in all important matters of State, especially in matters in connection with other nations, full information, and discusses with the Prime Minister or Minister in attendance the salient features of every important measure suggested and is enabled to express, if not to enforce, his opinion. The personal equation of the Crown is an important factor in the government of the nation. In more than one instance, during the reign of the great Queen, it has been said, she wielded an influence with her Ministers, that made for the welfare of her people as well as for international peace. In one case, it is claimed, by the legitimate exercise of "constitutional criticism" (during the Trent affair in 1861) she induced a modification in the terms of remonstrance, addressed in a despatch to the United States Government, which largely contributed to avert a threatened rupture between Great Britain and America. How admirably she discharged her duties as a Sovereign, finds expression in a speech delivered by Disraeli in 1871, at Hughenden. The great statesman said:—"A very erroneous impression is prevalent respecting the duties of a Sovereign of this country. Those duties are multifarious; they are weighty; they are incessant. I will venture to say that no head of any department of the State performs more laborious duties than those which fall to the Sovereign of this country. There is no despatch received from abroad, nor any sent from the country, which is not submitted to the Queen; the whole of the national administration of this country greatly depends

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upon the sign-manual; and of our present Sovereign it may be said that her signature has never been placed to any public document of which she did not approve. Cabinet councils . . . are reported and communicated on their termination by the Minister to the Sovereign, and they often call from her remarks that are critical, and necessarily require considerable attention," . . . and "such complete mastery of what has occurred in this country, and of the great, important subjects of State policy, foreign and domestic, for the last thirty years," is possessed by the Queen, that "he must be a wise man who could not profit by her judgment and experience."

The extraordinary occasions, where the King acts wholly on his own responsibility, are thus summarized by Mr. Sydney Low:—"If the King has reasons for believing the majority in Parliament no longer represents the wishes of the majority of the Electorate, he may require the Prime Minister to seek a fresh mandate from the nation; or he can send for the leader of the opposition and appeal to the country on his behalf. On the other hand the Sovereign may refuse a dissolution. When a new Parliament meets, the King decides which of the leaders of the predominant party he will send for and ask to construct a Cabinet; while when a Ministry changes, the whole authority of the State returns into the King's hands. Over and above this, the Crown provides that "unity" which is the "soul of government." The King, in Council, is the Executive, the King in Parliament is the Legislature, the King in his Courts administers justice. Thus the Crown binds together every department in the State, while it is the strongest link which unites the Colonies to the Mother Country. Above all, the Crown is permanent, while Ministers and Parliaments come and go."

Well has it been said by Mr. Chambers,—"The sovereign is no mere figurehead; he is not unfrequently the compass of the Ship of State, without which the man at the wheel would steer in vain and the vessel run on to the rocks."

Two great evils had to be grappled with and overcome to insure the full benefit sought to be effected by the Bill of Rights, that is to say—the need of parliamentary reform, and the bribery of Members. In 1793, in a House of Commons of 558 members a majority of 354 was returned by less than 15,000 electors. A large portion of these were returned on

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the nomination or recommendation of the Government and private patrons. On a particular occasion the younger Pitt, in tones of righteous indignation, exclaimed,—"This House is not the representative of the people of Great Britain; it is the representative of nominal Boroughs, of ruined and exterminated towns, of noble families, of wealthy individuals, of foreign potentates." In the early part of the reign of George III., in 1766, Lord Chatham, the elder Pitt, was a no less strenuous advocate of parliamentary reform. With the full weight of his powerful eloquence he stigmatized the Borough representation as the rotten part of the Constitution. "It cannot," he exclaimed, "continue the century; if it does not drop, it must be amputated. Either the Parliament will reform itself from within, or be reformed with a vengeance from without." Direct gifts of money to members were also freely resorted to by Ministers, and, bribery, it is said, was reduced to a system, during his tenure of office, during the reign of George II., by Sir Robert Walpole, and under the regime of Lord Bute, during the reign of George III. The time, however, was not yet ripe for parliamentary reform. It was not until 1832, the Great Statute, the Reform Bill of 1832, called by some,—"The Great Charter of 1832," was passed under the Whig Ministry of Lord Grey, who had faithfully advocated Reform for forty years. It was passed after defeats in both Houses of Parliament, and only after the threatened creation of Peers. By this Statute, 56 rotten Boroughs, returning 111 members, were swept away. For the purpose of illustration some of these Boroughs may be mentioned. At Tavistock the voters numbered only ten. At Gatton, only seven; at Old Sarum there was neither house nor inhabitant, in the Borough. At Midhurst, the constituent body consisted of 118 stones, denoting where the same number of burgage tenures were to be found. At Castle Rising two houses returned two members to Parliament. While Birmingham, Manchester, and Liverpool, with about fifteen thousand dwellings apiece, sent no representatives to Parliament. In the early part of the nineteenth century it was shown that seventy members were returned by thirty-five Boroughs, with practically no electors; that ninety members were returned by forty-six constituencies, each of which had less than fifty electors; and that thirty-seven members were returned by nineteen Boroughs

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with less than a hundred voters each. Many of these Borough seats were for sale by the Burgesses, and were known as pocket or rotten Boroughs, and the purchasers could vote as they pleased. Many of the Boroughs publicly advertised themselves for sale. It became subject of complaint, that by competition of wealthy merchants and Indian Nabobs, the price of seats had risen inordinately. Lord Chatham announced publicly, that with foreign gold they had forced their way by such a torrent of competition as no private fortune could resist. Where the seat could not be secured by direct purchase enormous sums were spent in bribing the Electorate. In 1768 the contest for Northampton cost each of the candidates £30,000. In 1807 the joint expense of the two candidates for Yorkshire is said to have been £200,000. The complicity of the Crown, when bribery became a part of the science of government, is more than hinted at, in the corruption of the Electorate. In 1779, George III. wrote to Lord North,—"If the Duke of Newcastle requires some gold pills for the electors, it would be wrong not to satisfy him," and it is said, that there is abundant proof that the King put large sums at the disposal of his Ministers for this purpose. In view of what was subsequently accomplished by the Reform Bill of 1832, called by many a second Magna Charta, how factious seems the speech of Sir Robert Peel, one of its most uncompromising opponents,—"Should this Bill pass," he exclaimed, "there would be established one of the worst despotisms that ever existed. We would have a Parliament of mob demagogues—not a Parliament of wise and prudent men. Such a Parliament has brought many happy countries to the brink of destruction." And, pray, who were the demagogues that were urging forward the nation to its utter ruin and demolition? None other than Lord Grey, Lord Brougham, Lord John Russell, Lord Durham, the author of the Magna Charta of Canada, Lord Melbourne, Lord Palmerston, Sir James Graham, and Mr. Stanley, afterwards Lord Derby, all historic names, each the peer of Peel or Wellington.

Bribery, not only among the Electorate, but graft on the part of those intrusted with the sacred duty of directing the affairs of state, is the crying evil of the day, and that, too, in our very midst, permeating and corrupting all classes from the highest to the lowest. The shocking disclosures made before Public Accounts Committees, as also, before

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Royal Commissions, so revolting and bare-faced, smirching the reputations of our public men, indicate the depth of infamy to which we have already fallen. If unchecked, this cankerous growth will surely sap the vitality of the body politic of our fair Dominion. Already it has caused the blush of shame to mantle the cheek of every patriotic Canadian. In the words of Lord Chatham,—"Either Parliament will reform itself from within, or be reformed with a vengeance from without."

SILAS ALWARD.

St. John, N.B.

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COMPANY BY-LAWS.

"And considering the large and increasing sums which are now constantly being invested both by Canadians and by others in enterprises in this Country, organized as joint stock companies, any other rule would be so disastrous as to be intolerable. Who would invest in shares the value of which might be at any time impaired or even practically destroyed by a by-law passed from 'time to time' in the language of sec. 80 (Dominion Act) by a majority of a Board of Directors, interfering with or restricting their negotiability after the manner of other property?" Per Mr. Justice Garrow in *In re Jacob Y. Shantz.*[1]

"Had it been proven that McKain at the time he accepted the transfer of the stock had notice of the company's by-laws, the company would have been warranted in refusing to enter a transfer of the three shares to McKain on its books; but it is not questioned that McKain purchased and paid for the stock without notice or knowledge of any by-law creating a lien or charge in favour of the company to secure the indebtedness due to it by the holder of this certificate for fully paid up stock?" Per Mr. Justice Macmahon in *In re McKain and Canadian Birkbeck Co.*[2]

These comments cast such doubt upon the force and effect of a company by-law that a study of its origin and nature is worth consideration. With due respect for the learned judges who made these remarks, it is submitted that they are not supported by statute or authority. The companies, whose by-laws were considered, were incorporated under Dominion statutes. It may be stated that the by-laws of companies under statutes of the Dominion and the Provinces of Ontario, Quebec, New Brunswick, Manitoba and Prince Edward Island have similar authority. The other provinces have followed the English legislation of 1862 or later, and the regulations of companies there created are not the subject of these remarks.

There are two well defined kinds of companies under the law of England—common law companies created by letters patent, and statutory companies. The Acts of 1862, sec. 4,

[1] (1911) 23 O. L. R. 544, at pp. 552.
[2] (1904), 7 O. L. R. 241, at p. 247.

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and 1908, sec. 1, recognized the possible existence of companies differing in nature from either of these, created under a deed of Settlement or Articles of Association, but these sections also provide that such companies, if composed of more than twenty persons, shall be illegal, unless registered under the Act then in force which controls their activities. By the Canadian system, companies are created by Private Acts of Parliament or letters patent issued under general Acts which have similar effect. In the United Kingdom incorporation is effected by filing a Memorandum of Association and Articles of Association which consist of the regulations for the conduct of the affairs of the company. To fully understand the control of Canadian companies, it is necessary to study the common law company as well as the existing statutory company of the United Kingdom as it at present exists.

The Canadian system is a development of the common law company by statute. The first statute authorizing the incorporation of companies by letters patent was passed in 1864 (27-28 Vict. ch. 23), and it has been followed with some modifications to the existing Dominion Companies Act and similar Statutes of the provinces referred to. Sections 80 and 81 of the Dominion Act are in similar wording to sec. 7 of the Act of 1864. That statute superseded ch. 63 of the Consolidated Statutes of 1859, which consolidate the statutes respecting trading companies prior to that time commencing with 13-14 Vict. ch. 28. The origin of the Act of 1864 is difficult to discover, but it may be safely said that it followed similar legislation of the States. The English Act of 1844 (7-8 Vict. ch. 110, sec. 25) authorized companies "to make from time to time at some general meeting of shareholders specially summoned for the purpose, by-laws for the regulation of the shareholders, Members, Directors and Officers of the Company, such by-laws not being repugnant to or inconsistent with the provisions of this Act or of the deed of settlement of the company." The word "by-law" was not used in the English Act of 1856 (19-20 Vict. ch. 47), the word regulation being adopted as it is in subsequent legislation. Support for the contention that the origin of Dominion company law must be traced to that of the common law company, is given by the use of the word 'by-law' to signify the body of regulations of the company. It is significant that this word was used with respect to common law companies, and it

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is not used in the Acts of 1856, 1862 or 1908. Moreover, this word was used in the earliest Canadian legislation, and, as no definition was given, it may be inferred that the word was intended to have its then accepted meaning. The Canadian statutes now in force do not define the word 'by-law' or indicate the effect of such an enactment. The English Act (1862 sec. 16), 1908 sec. 14, declares that the articles of association when registered shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto.

In applying to a consideration of the by-laws of Canadian companies decisions of the Courts of the United Kingdom in cases which arise out of the effect of Articles of Association, an essential difference in their nature should be well in view. Articles of Association are public documents, and all persons dealing with a company so regulated are held to have notice of them. On the other hand, the by-laws of Canadian companies are not public documents. They are known only to the company, its officers and shareholders. The public documents of such companies are the statute under which the company is incorporated, the letters patent and such by-laws and statements as the company is required to file. The effect of public documents was pointed out in the *Birkbeck* case, but this difference was not noted.

Then turning to the decisions raised by the interpretation of common law company 'by-law,' we are confronted with the difficulty that in many of them the devolved bit of sovereignty which is embodied in municipal incorporation is met. The Hudson Bay Company, the East India Company and many others of that class had governmental powers as well as those of a trading company. Moreover, the cities and boroughs of England were established under Charters of the same nature, and have the usual incidents of municipal government.

The word 'by-law' is used in an entirely different sense with respect to municipal and other similar corporations. There it signifies a regulation which is a bit of devolved sovereignty and is not based on contract as a 'by-law' of a company undoubtedly is. A by-law of a municipal corporation regulates the action of all persons living in the municipality irrespective of contract. But the by-laws of a company have effect by force of the contractual relation existing between the shareholders *inter se* and the company. For this

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reason the cases—*Virgo* v. *City of Toronto, A. C. Jonas* v. *Gilbert,*[3] and *Regina* v. *Flory,*[4] cited as authorities in the *Shantz* case have little application in considering company by-laws.

A consideration of the cases which arose with respect to common law trading companies with objects similar to those incorporated under the Canadian Companies Acts encounters a further difficulty. The attitude of the Courts with respect to the mutual rights and obligations constantly developed. It is fair, however, to say that these mutual rights and obligations did not change in nature. The discussion by the Courts of the relation of members to each other and to the company has refined and elaborated the legal principles underlying these subjects, and this development has taken place side by side with similar growth in other branches of the law. A contract at the time when the principle of consideration had not developed, was a contract as held by the Courts to-day, but the consequences may have been different from what they are now held to be. While the decisions of old cases may shed light on legal discussions of to-day, this growth of the law should be well in view.

The change in the decisions with respect to the interest of a shareholder is pertinent. In *Child* v. *Hudson Bay Company,*[5] it was in effect held that the legal interest in the property of the company was in the company as trustee for the several members. In *Bligh* v. *Brent,*[6] it was contended that the assets of the company being realty, the shares should be so considered. The doctrine just referred to was superseded and it was held that corporate property should be considered as that of a partnership. The modern doctrine is set out in *Borland's Trustee* v. *Steel Brothers & Co., Limited,*[7] where it is held that a share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders *inter se* in accordance with sec. 16 of the Companies Act, 1862 (Act 1908, sec. 14.)

Blackstone (1 Commentaries 475) enumerates the incidents annexed to a corporation as soon as it is created, and

[3] (1881) 5 S. C. R. 356.
[4] (1889), 17 O. L. R. 715.
[5] (1723) 2 P. Wms. 207.
[6] (1836) 2 Y. & C. 268.
[7] [1901] 1 Ch. 279.

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the fifth is as follows: 'To make by-laws or private statutes for the better government of the corporation, which are binding on themselves, unless contrary to the law of the realm, and then they are void.'

The authority to make by-laws was considered in *Bligh* v. *Brent* (*supra*), as follows: "A corporation has an implied power to make by-laws; but where the charter gives the company a power to make by-laws they can only make them in such cases as they are enabled to do by charter; for such powers given by the charter imply a negative, that they shall not make by-laws in any other case."

There can be no doubt but that the ancient cases decided that the by-laws of a corporation form part of the charter under which they were made. Grant in his work on Law of Corporations published in 1850, p. 80, dealing with *Tucker* v. *The King*,[8] states as follows:—

'Where a by-law is duly made in accordance with the provisions of the charter, in a matter within the competence of the corporation to regulate, the by-law, to some purposes, may be considered as forming a part of the charter in pursuance of which it has been made; thus where a defendant to a *quo warranto* information insisted in his plea on the charter, but in his rejoinder rested his defence upon a by-law, it was held, by the House of Lords, on the unanimous opinion of six of the judges who were desired to assist the house, that there was no departure."

Grant, p. 76, summarizes the effect of by-laws as follows: 'The by-laws of a corporation are always obligatory on all the members, and each member is bound to take notice of them; for every one within the scope of the by-laws is considered as having given his consent to them,' and reference is made to *Vinters Company* v. *Passey*,[9] and *R.* v. *Trevethan*.[10]

It is unnecessary to refer to further authorities as they indubitably held that by-laws were binding on all members of the corporation. It follows that this binding effect must arise from a contract which each member is deemed to enter into when he becomes a shareholder.

The mutual covenants entered into *inter se* between the shareholders of a company are embraced in the statute under

[8] (1742) 2 Br. P. C. 311.
[9] 1 Burr. 239, 250, T. Jones 145.
[10] 2 B. & A. 339.

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which the company is created, the letters patent and the by-laws. In the case of English companies, these documents consist of the statute, the Memorandum of Association and the Articles of Association. The Memorandum may be said to be equivalent to the letters patent and the Articles to the by-laws. There is, however, one important difference, as indicated above, to be dealt with. The statute is a public document, and the company and all who deal with it are bound by its terms. The same applies to the Memorandum of Association and the letters patent. But the Articles of Association and the by-laws differ in the important feature that the Articles are public documents and the by-laws are not. While both bind all members, the by-laws do not bind strangers who deal with the company, without express notice. In *Mahony* v. *East Holyford Mining Co.*,[11] Lord Hatherley said: "Every joint stock company has its Memorandum and Articles of Association; every joint stock company, or nearly every one, I imagine, (unless it adopts the form provided by the statute, and that comes to the same thing) has its partnership deed under which it acts. Those Articles of Association and that partnership deed are open to all who are minded to have any dealings whatsoever with the company, and those who so deal with them must be affected with notice of all that is contained in those two documents."

This question is dealt with by MacMahon, J., in *Re McKain and Canadian Birkbeck Co.* (*supra*), and a reference is made to Buckley where it is stated that 'after much difference of opinion, it must be taken to be settled, that persons dealing with a registered company are bound to acquaint themselves with the limits imposed by the deed of settlement or articles of association on the authority of the directors; yet strangers to the company dealing with directors cannot be affected by by-laws, which under the articles be from time to time made and varied by the directors, unless notice of such by-laws is proved.' This is a comment upon Article 71 Table A. of the Act of 1908 (Buckley, 9th ed., 636), which provided that 'the business of the company shall be managed by the directors . . . subject nevertheless to any regulation of these Articles, to the provisions of the said Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting.' The 'by-laws' indicated by

[11] (1875) L R. 7 H. L. 869, at p. 893.

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Buckley are the 'regulations,' referred to, 'as may be prescribed by the company in general meeting.' Such 'by-laws' or 'regulations' stand in the same position as 'by-laws' of a Canadian company.

The subject is clearly dealt with in *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Company.*[12] Lord Halsbury:—"Persons dealing with joint stock companies are bound to look at what one may call the outside position of the company—that is to say, they must see that the acts which the company is purporting to do are acts within the general authority of the company, and if those public documents, which everyone has the right to refer to, disclose an infirmity in their action, they take the consequences of dealing with a joint stock company which has apparently exceeded its authority. But the case here is exactly the other way. All the public documents with which an outside person would be acquainted in dealing with the company, would only shew this, that by some regulations of their own, what Lord Hatherley (in *Mahony* v. *East Holford*) described as their indoor management, they were capable, if they had thought right of making any quorum they pleased; and an outside person knowing that, and not knowing the internal regulation, when he found a document sealed with the common seal of the company and attested and signed by two of the directors and the secretary, was entitled to assume that that was the mode in which the company was authorized to execute an instrument of that description."

The authorities and citations referred to in the *McKain* case were cases where the questions under discussion arose between the company and a stranger not a shareholder. But by-laws are required to be passed upon by the shareholders, and they are all bound thereby. This binding effect arises out of the contract entered into by becoming a shareholder.

In the *McKain* case the shares of the company were subject to a lien in favour of the company for any amount due by a shareholder to the company. The share certificate expressly set out 'that the articles of the company are part and parcel of this contract.' A shareholder transferred shares subject to a lien of which the transferee was not aware. On an application to compel registration of the transfer, relieved of the lien, it was held that the transferee, not having express notice of the by-law, was not bound thereby.

[12] [1895] 1 Ch. 629.

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This decision is open to two criticisms. The rule laid down in the above cases that shareholders are bound by mutual contracts *inter se* set out in the statute, letters patent and by-laws, is set aside. It is the logical consequence of this decision that a shareholder may relieve himself of his obligation by a transfer of his shares, and that a contract embodied in definite documents may be varied by an assignment. Moreover, a rule which is applicable to strangers dealing with the directors of a company is applied to a transaction between a shareholder and a stranger. The transaction which gave rise to the question in the case arose in the transfer of the shares. This was not between the company or the directors, or the company and a stranger, but between a shareholder and a person who by the transaction became a shareholder. Undoubtedly a stranger under such circumstances may set up an estoppel on an application to register a transfer, but no such grounds appear in the case.

In the *Shantz* case the certainty of company by-laws is reflected on because they are liable to be amended from "time to time." Section 80 of the Dominion Companies Act authorizes the Directors from 'time to time' to make by-laws as to matters therein particularly set out. And sec. 81 provides that the directors may from 'time to time' repeal, amend or re-enact such by-laws, subject to defined limitations.

It should be pointed out that while the shareholders and the company have a contractual relation which is embodied in the statute, the letters patent and the by-laws, this contractual relation is not fixed, but may be varied in the manner provided by these instruments. It is an essential element of the contract that it may be varied.

Wright v. *the Incorporated Synod of the Diocese of Huron*,[12] although not dealing with company by-laws, nevertheless sheds very considerable light upon the subject. The question in that case related to a by-law of trustees passed under the provisions of the Clergy Reserve Act. Chief Justice Ritchie says as follows: "On the other hand, may it not with much more force be said, that inasmuch as the trust was for the support and maintenance of the clergy, in such a manner as shall from time to time be declared by any by-law or by-laws to be from time to time passed for that purpose, the plaintiff had no right to assume that the disposition of the fund would not be from time to time altered as the

[12] (1884) 11 S. C. R. 95.

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exigencies of the diocese, and the maintenance and support of the clergy then might, in the judgment of the synod, require." Strong, J.—"What, then, was meant by the founders of this charity, for such in law it is, when they declared that it should be applied to the purposes designated in such manner as should be declared 'from time to time' by by-laws to be 'from time to time' passed? It is plain that this must depend entirely on the meaning to be attributed to the words 'from time to time,' an expression, it will be observed, twice repeated. Did the settlors, by that expression, intend to confer on the members the power to create absolute vested interests in the fund or in its income, or must it be taken to mean that such dispositions as the synod should make, should be by by-laws at all times subject to repeal or alteration? I, therefore, come to the conclusion that the terms of this trust made it incumbent on the trustees to reserve to themselves such power as should enable them to be free to act at all times, and did not warrant any disposition of the income which should not be subject to be re-called or altered by any by-laws which the synod might think fit to pass."

The rule deducible from this case appears to be that where the contract provides for changes in its terms, such changes may be made.

This subject is also dealt with in *Allen* v. *Gold Reefs of West Africa*.[14] Lindley, M.R., at p. 671:—"The articles of a company prescribe the regulations binding on its members Act 1862, sec. 14 (1908, sec. 16). They have the effect of a contract; but the exact nature of this contract is even now very difficult to define. Be its nature what it may, the company is empowered by the statute to alter the regulations contained in its articles from time to time by special resolutions (Act 1862, secs. 50-51, Act 1908, sec. 13); and any regulation or article purporting to deprive the company of this power is invalid on the ground that it is contrary to the statute: *Walker* v. *London Tramways Co.*[15]

The power thus conferred on companies to alter the regulations contained in their articles is limited only by the provisions contained in the statute and the conditions contained in the company's Memorandum of Association. Wide, however, as the language of sec. 50 Act 1862 (sec. 13, 1908), is, the

[14] [1900] 1 Ch. 656.
[15] (1879) 12 Ch. D. 705. See, also, *Mallinson* v. *National Insurance and Guarantee Corporation*, [1894] 1 Ch. 200.

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power conferred by it must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also *bona fide* for the benefit of the company as a whole, and it must not be exceeded. These conditions are always implied, and are seldom, if ever, expressed." Lindley, at p. 673:—"It was urged that a company's articles could not be altered retrospectively, and reliance was placed on Rigby, L.J.'s, observations in *James* v. *Buena Ventura Nitrate Grounds Syndicate*.[17] The word "retrospective" is, however, somewhat ambiguous, and the concurrence of Rigby, L.J., in *Andrews* v. *Gas Meter Co.*,[18] shews that his observations in *James* v. *Buena Ventura* are no authority for saying that existing rights founded and dependent on alterable articles, cannot be affected by their alteration. Such rights are in truth limited as to their duration by the duration of the articles which confer them."

In the case just referred to, a change of the articles giving the company a lien on paid-up as well as shares not fully paid, for debts due the company, was upheld, although there was but one shareholder holding fully paid shares, on the grounds that the change was *bona fide* and in the interest of the company.

The authority of the directors to pass by-laws has been considered in few Canadian cases, and these cannot be said to develop the subject in principle and authority. In *Re Imperial Starch Co.*,[19] may be referred to. After commenting upon the statute authorizing the directors to make by-laws to regulate 'the transfer of stock,' and inferentially deciding that authority to regulate does not include authority to restrict, the case is decided upon the authority of *Re Panton and Cramp Steel Co.*,[20] which decides quite a different question, namely, that in the absence of a by-law the transfer of fully paid shares may not be restricted, and it was held that the resolution closing the transfer books of the company was invalid. The result may have been supported on the ground that the by-law in consideration was not *bona fide* in the interests of the company.

[17] [1896] 1 Ch. 466.
[18] [1897] 1 Ch. 361.
[19] (1905) 10 O. L. R. 22.
[20] (1904) 9 O. L. R. 3.

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This question was also dealt with in the *Shantz* case. The judgment in the Divisional Court,[21] appears to be based on three grounds: (1) that authority to regulate does not include authority to restrict; (2) that shares are personal property and the rule against limitation of alienation applies, and (3) distinguishing *In re Coalport China Co.*,[22] that the by-law did not create a contract as did the article of association in that case.

The first ground appears to be inconsequential. It is based on the authority of *City of Toronto* v. *Virgo*.[23] That case decided that a municipal by-law passed under a statute giving authority to regulate did not include authority to restrict. Municipal by-laws are passed and enforced under the authority of devolved sovereignty. They are not matters of contract. Different rules are laid down for their construction. They are strictly limited to the authority conferred and in no way can the intention of persons subject to them affect their force, nor may contractual obligations arise from them. Contracts on the other hand are construed to give force to the intention of the parties thereto. It may be that this is a proper legal conclusion, but the reasons given therefor are not applicable.

The second ground appears equally inconclusive. Section 45 of the Dominion Companies Act provides that 'the stock of the company shall be personal estate.' Section 22 of the English Act 1908, similarly provides that the shares or other interests of any member shall be personal estate. Section 22 of the Act of 1862 is in the same words. In numerous English cases the right to restrict the transferability of shares appears to be unquestioned, and it is strange that if the rule against the prohibition of the alienation of personal property is applicable, it was not referred to in any of these cases.

The same provision is in the Canadian Act of 1850, 13 & 14 Vict. ch. 28, sec. 10, and in the Consolidation of 1859, ch. 63, sec. 20, and in the Act of 1864, 27 & 28 Vict., ch. 23, sec. 9.

Indeed, these words may be said to have an historical origin. In *Child* v. *Hudson's Bay Co.* (*supra*), a judgment

[21] (1910) 21 O. L. R. 153.
[22] [1895] 2 Ch. 404.
[23] [1896] A. C. 88.

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of Lord Macclesfield, it was held that the company was possessed of its property in trust for the shareholders, and it followed that a share was real estate or personal according as the corporate property was real or personal. Shares of the New River Water Company in several cases were held to be real property and descended to the heir. It was not until *Bligh* v. *Brent* (*supra*), that the modern view was established and corporate property was considered, as that of a partnership, personal. It seems to be apparent that this widening of the Act of 1862 was adopted to set such questions at rest and establish shares as personal property. It is pointed out by Meredith, J.A., in his dissenting opinion, that company shares cannot be considered as personal property of the nature of pigs, sheep or cows so as to make the rule prohibiting the restriction of alienation of personal property applicable. Shares are personal property as rights under a contract. There are well defined rules upon restrictions of the assignability of contracts, but it cannot be contended that they are applicable to contracts such as those existing under company documents. In *Entwistle* v. *Davis*,[24] it was decided that shares of a company incorporated in 1856 were not an interest in the real estate of the company for the purposes of a charitable bequest under the Mortmain Acts.

The third ground appears to be equally elusive. The by-law in question was passed at the organization meeting of the company. All the shares, excepting those applied for on the issue of the letters patent, were issued after it was passed, and, as the incorporators enacted the by-law, all the issued shares of the company were subject to it. In referring to the *Coalport China* case, it is stated that the Articles of Association were a binding contract. The inference is that the by-laws of a Dominion company have not the force of a contract. It may be that shares of such a company are of a different nature from those of a company under the English Act. If so, it is difficult to see the legal principles upon which this difference is based. The cases above referred to which considered the force of the by-laws of a common law company declared them to be binding on all the shareholders. How can they bind unless it be contractually.

On appeal to the Ontario Court of Appeal the only question considered was whether it was competent for a company

[24] (1867) L. R. 4 Eq. 272.

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under the Dominion Act to pass such a by-law. Moss, C.J.O., did not refer to authorities and decided upon general principles, agreeing with the reasons given by the Divisional Court. Garrow, J.A., cited cases arising out of municipal by-laws, and some of the cases above referred to. The English authorities on similar questions are set aside because of the binding effect of deeds of settlement and articles of association, and company by-laws are held to be of questionable authority.

The subject was again dealt with by the Ontario Appellate Division in *Re Belleville Driving and Athletic Association*,[25] and not further advanced, the Court being bound by the decision in the *Shantz* case. However, there is a suggestion in this case which should be referred to. "If it is desired by the incorporators of a company that restrictions should be placed upon the rights of shareholders to transfer their shares, it would be a simple matter to have a provision of that nature embodied in the letters patent." This leads to a veritable *cul de sac*. Under the Ontario Act such a provision is expressly prohibited to companies other than Private. Under the Dominion Act it is nullified by the *Shantz* decision. Section 8 of that Act provides that 'the application shall be in accordance with Form A. in the schedule to this Act and may ask to have embodied in the letters patent then applied for, any provision which could under this Part be contained in any by-law of the company or of the directors approved by a vote of shareholders.' The argument before the Ontario Court of Appeal in the *Shantz* case was limited to one general question, viz., the power of the appellants, a company incorporated under the Dominion Companies Act, to restrict the transfer of fully paid-up shares in the company, and the decision was that it was not competent of the company to pass a by-law having this effect. Section 8 of the Act above quoted is the sole section authorizing such a provision in the letters patent, and the provision is limited to that which may be contained in a by-law. The *Shantz* case decides that such a by-law may not be passed. It may be that the attention of the Court was not directed to this section and the suggestion referred to was inadvertently made. However this may be, it appears that under the authorities as they now stand, in no case may the transferability of shares of a Dominion Company be limited.

[25] (1914) 31 O. L. R. 79.

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The business effect of the decision seems to underlie reasons for judgment. The result, however, seems questionable. It is undoubtedly in the business interests of many campanies that the transferability of their shares should be limited. Moreover, the rule of the Stock Exchanges which prohibits the listing of shares so limited is a general protection to the public. Protection to the investing public is less likely to be given by fictitious limitations of companies than by a well-defined series of decisions which shew to the investor that his best security lies in an investigation of the shares offered.

There are two principles laid down in *The North-West Electric Co.* v. *Walsh*,[26] which have general application beyond the questions there raised. "And in the third place the by-laws and resolutions were bad upon the general common law principle that a by-law must not be unreasonable or work unequally towards members of any one class affected by it." "The fact that the respondent held a paper which upon its face stated that she held so much stock paid in full, while evidence of the statement, was not conclusive evidence of it. . . . Apart from the operation of the doctrine of estoppel, I know of no reason why any holder of stock which has not been paid for in full should not be liable for the balance due in respect of it." *Bloomenthal* v. *Ford*,[27] was referred to. The first gives the test of validity of a by-law which otherwise is within the competency of the company, and the second a clear view of the law applicable in the *McKain* case. The share certificate is not the whole contract. No doubt the company may be estopped by express statements therein, but the whole contract embodied in the statute, the letters patent and the by-laws as well as the certificate governs.

A pertinent statutory provision seems to have escaped attention in the consideration of the above cases. Section 30 R. S. C. 1906, ch. 1, which is as follows:—

'30. In every Act, unless the contrary intention appears, words making any association or number of persons a corporation or body politic and corporate shall

(b) vest in a majority of the members of the corporation the power to bind the others by their acts.'

This legislation first appeared in 1849, 12 Vict. ch. 10, sec. 56 (24th clause.) It was carried forward in the Con-

[26] (1898) 29 S. C. R. 33.
[27] [1897] A. C. 156.

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solidation of 1859, ch. 5, sec. 6, clause 24th, and has been embodied in the consolidations since that time. The section is not applicable to private Acts incorporating companies alone. Section 2 of the Interpretation Act makes its provisions applicable to every Act of the Parliament of Canada now or hereafter passed.' Under sec. 5 of the Companies Act, a company created thereunder is expressed 'to be a body corporate and politic.' No intricate analysis of clause (b) is necessary. The word 'bind' has been interpreted as synonymous with 'charge' and 'oblige.' That is, it connotes a contractual obligation. It remains to determine what is meant by the word 'acts.' The use of the word 'majority' in this sub-clause, while it may have further extension, clearly includes those acts which are determined by the 'majority' and 'the others,' namely, deliberations in general meeting. The confirmation of by-laws passed, amended and repealed are, by sec. 81, matters for consideration at a general meeting. It follows that a contractual obligation by the members *inter se* is created by a by-law. Undoubtedly the wording of the sub-clause is not precise in leading to the above conclusion, but it is difficult to see what different result can be arrived at.

The conclusions to be drawn are obvious. Shareholders stand towards each other and the company in a contractual relation. The contract is embodied not only in the share certificate but also in the statute, the letters patent and the by-laws. Moreover, the contract may be varied from time to time in the manner provided by these documents.

Under sec. 81 of the Dominion Act, the directors have authority to repeal, amend or re-enact any by-law which may be enacted under sec. 80. Such repeal, amendment or re-enactment has force and effect immediately without confirmation by the shareholders, but it remains in force only until the next annual meeting unless confirmed thereat.

This provision may not be as wise as that of the English Act which requires confirmation before the change becomes effective. Nevertheless, unless it can be shewn that a by-law so enacted is not *bona fide*, not in the interests of the company or not undue with respect to a minority, it is in force and binding on all shareholders.

THOMAS MULVEY.

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MUNICIPAL CRIMINAL LAW. A REPLY.

The learned Editor of the C. L. T. deemed it his duty to dissent from the opinion expressed in my former article on 'Municipal Criminal Law.'[1] When I wrote my article I had no desire to enter into any argument over the subject therein discussed, but since the learned Editor referred the reader to certain pages of his work on Canada's Federal System, I feel justified in making an examination of the pages referred to by him.

On page 582 of the learned Editor's said work, he says, 'although the Dominion parliament has *apparently* power to prohibit and punish any act as a crime, except a mere breach of a provincial law validly made under one of the clauses in sec. 92.'

I object to the word "*apparently.*" I submit that there is no doubt that the Parliament has unlimited power to make any act a crime. It is wholly and solely for the Parliament to say what acts shall be crimes in Canada, and the Privy Council held that it is Criminal law in its *widest* sense that is reserved by B. N. A. Act (1867), sec. 91 (27), for the exclusive legislative authority of the Parliament of Canada. *Atty.-Gen. for Ontario* v. *Hamilton St. R. W. Co.*[2]

I submit that there can be no doubt as to what their lordships meant when they rendered the above decision. However, the learned Editor continues, 'and although it cannot be denied that Parliament can draw into the domain of criminal law any act which has hitherto been punished only under a provincial statute, it *does not follow* that when Parliament has drawn an act into the domain of criminal law, the right of the provincial legislatures to pass laws in regard to such an act necessarily ceases. Provincial legislatures may still, in many instances, legislate against the same act in another aspect.'

I submit that this is the very reverse of the law, and the first case[3] cited by the learned Editor on page 329 of his work so decides. There Graham, E.J., said, "When Parliament has drawn an act into the domain of criminal law, the

[1] 35 C. L. T. 406.
[2] [1903] A. C. 524.
[3] *Thomas* v. *Haliburton* (1893), 23 N. S. R. at p. 73.

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right of the provincial legislature to pass laws in regard to such act necessarily ceases."

This is in perfect accord with the opinion expressed in my former article, and I submit that it is good law, notwithstanding the fact that the learned Editor says that it is impossible to accept that view.

The next case mentioned is *Dallaire* v. *La Cité de Quebec*,[4] which arose over a charge of vagrancy under a municipal by-law of the city of Quebec. Langelier, A.J.C., decided that "when the Parliament of Canada has declared an act criminal, has laid down the procedure to be followed for punishing the act and named the tribunal which shall have jurisdiction over it, a provincial legislature has no right to make a statute to punish the same act, and to name the tribunal which shall take cognizance of it, as well as the procedure to be followed in order to punish it."

His lordship also held that, "this is not a law the object of which is to maintain good order in the City of Quebec, but it is a law of a general character, and one which declares criminal all the acts which fall under the term vagrancy. It is, then, a true criminal law, and consequently one within the exclusive jurisdiction of the Federal parliament. The Quebec legislature has no power to pass laws declaring criminal all those acts of vagrancy which have already been declared such by the Criminal Code." See Code secs. 238, 239.

I now wish to make the bold statement that there is not one single case on record which has decided anything contrary to my contention. Let us examine a few cases which at first blush seem to be at variance with this statement. The learned Editor, on page 583 of his said work, quotes certain portions of the judgment of Taschereau, J., in *Huson* v. *Township of South Norwich*:[5] "There are a large number of subjects which are generally accepted as falling under the denomination of police regulation over which the provincial legislatures have control within their territorial limits, which yet may be legislated upon by the Federal parliament for the dominion at large. Take, for instance, the closing of stores and cessation of trade on Sundays. Parliament, I take it for granted, has the power to legislate on the subject for the Dominion; but *until* it does so, the provinces have, each for itself, the same power."

[4] (1907) 32 Que. S. C. 118.
[5] (1895) 24 S. C. R. at p. 160.

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Now if you will take time to read this case you will see that the above remarks were not necessary for its decision; therefore, they are merely *obiter dicta,* not a decision. You will also notice that Taschereau, J., said that *until* the Dominion parliament had legislated upon Sunday observance the provinces had power so to do. The Ontario Legislature tried it. They passed ch. 246 of the R. S. O. 1897, being "An Act to prevent the Profanation of the Lord's Day." At this time the Dominion parliament had not enacted any similar law and according to the *obiter dicta* of Taschereau, J., this Act would have been *intra vires* of the province, but the Privy Council held that it was *ultra vires.* See *Atty.-Gen. for Ontario* v. *Hamilton St. R. W. Co.*[6]

Obiter dicta are very useful to help one in arriving at an opinion of what the law is, but I submit that they are of no value when in conflict with decided cases on the exact point.

The learned Editor, also, at pages 583-585 of his said work quotes from the argument of 'Mr. Horace Davey as he then was in his argument before the Privy Council in the case of *Hodge* v. *Regina.*'[7] It is needless to say that the argument of any counsel is no authority as to what the law is. It is too well known that the greatest of counsel argue for the litigant who pays most, not for the one whose cause is more just.

The learned Editor at page 590 of his said work has apparently proved his point, that both the Dominion parliament and the local legislatures have concurrent jurisdiction to pass penal laws. Let us examine the cases cited. The statute under consideration in *R.* v. *Wason,*[8] was an Ontario Act to provide against frauds in the supplying of milk to cheese and butter factories. This Act was one which could be properly classified as dealing primarily with property and civil rights and was held *intra vires* of the local legislature. I agree that this case was properly decided, but there is one point which the learned Editor has overlooked, viz., the Ontario Act was passed on March 23rd, 1888, and it was not until May 2nd, 1889, that a Dominion statute dealing with the same subject came into effect. Then came the case of *R.* v. *Stone,*[9] which held the Dominion Act *intra vires* also.

[6] [1903] A. C. 524.
[7] Dom. Sess. Pap. 1884, Vol. 17 No. 30, p. 98.
[8] (1889) 17 O. R. 64; 17 A. R. 221.
[9] (1889) 23 O. R. 46.

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There is nothing in the above cases in conflict with my contention. *R.* v. *Wason* was properly decided because the Dominion parliament had not at that time passed such an Act, but when the Parliament drew the subject into the domain of criminal law then the authority of the local Act necessarily ceased,[10] in so far as it in any way duplicated, over-lapped or conflicted with the Dominion Act, because where a field of legislation is within the competence of both the Dominion parliament and a provincial legislature, and both have legislated, in case of conflict, the enactment of the Dominion parliament must prevail: *St. Francis* v. *Continental Heat & Light Co.*[11]

On page 592 of the learned Editor's said work he gives two cases relating to prohibiting trading stamps. The first case, *Montreal Trading Stamp Co.* v. *Halifax,*[12] held that 62 Vict. (N.S.) ch. 52, sec. 2 was *intra vires.* This section amended the charter of the city of Halifax by prohibiting the sale of trading stamps. The second case was a reference by the Lieutenant-Governor of Ontario to the Court of Appeal for Ontario, for an opinion as to the validity of sub-sec. 41 of sec. 26 of the Ontario Municipal Act 1901, granting municipalities power to prohibit trading stamps. The only report of this case is to be found in 25 Que. S. C. at page 137. All four of the judges answered that the said sub-sec. was *intra vires* of the Legislature. Osler, J.A., however, was the only judge who gave any reason for his answer, which was that the subject came within property and civil rights in the province. His lordship was very careful to state: "*I must add that, I reserve my right to reconsider the question if and when it shall arise for decision in any real controversy between parties.*"

I have no fault to find with these decisions, but they were rendered prior to the enactment of Criminal Code secs. 505 to 508. And I submit that if Osler, J.A., were now asked for his opinion as to the validity of sub-sec. 48 of sec. 400 of the present Municipal Act he would avail himself of the above reservation of his right to reconsider his answer. I am satisfied that his answer would be "since the Dominion parliament has drawn the subject into the domain of criminal law

[10] *Thomas* v. *Haliburton* (1893), 23 N. S. R. at p. 73.
[11] C. R., [1909] A. C. 49.
[12] (1900) 20 C. L. T. Occ. N. 355.

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the authority of the provincial legislature has necessarily ceased." [18]

The balance of the pages of the learned Editor's work which he referred to, deal with the sale of intoxicating liquors, drugs and bread and the closing of shops. None of these subjects were touched upon in my former article and the cases cited by the learned Editor have no bearing upon my contention that certain sub-sections of the Ontario Municipal Act are *ultra vires*.

Just one word in closing, I do not wish to be understood as adversely criticising the learned Editor's said work, for he has only accepted the same view as expressed by other learned writers, however, I submit that no proposition laid down in any text book can be accepted as being the law when such proposition is in conflict with cases decided on the exact point. I further submit that the cases fully support my contention that certain sub-sections of the Ontario Municipal Act are *ultra vires* and I still contend that they should be omitted from the Revised Statutes of Ontario.*

WALTER E. LEAR.

May 17th, 1915.

[18] *Thomas* v. *Haliburton* (1893), 23 N. S. R. at p. 73.

*It is a pleasure to publish a reply to our footnote at p. 406, *supra*. We remain, nevertheless, unconvinced. Mr. Lear has been able to cite some decisions and *dicta* of provincial Courts which favour his view. Some favouring a different view are collected in Canada's Federal System, pp. 583-618. There may be added to these now—*per* Duff, J., in *Quong Wing* v. *The King* (1914), 49 S. C. R. at p. 462. It is our humble belief that when the matter comes squarely before the Supreme Court or the Privy Council, it will not be Mr. Lear's view which will be upheld. In the first place, we have the great principle enunciated by the Privy Council in *Hodge* v. *The Queen*, and quite unlimited in its application, that "subjects which in one aspect and for one purpose fall within sec. 92 of the B. N. A. Act may, in another aspect and for another purpose, fall within sec. 91;" and, secondly, there is, it is submitted, implicit in the term "criminal law" the idea of universality: the idea, to adapt words of Maclennan, J.A., in *Regina* v. *Wason*, 17 O. A. R., at p. 248, of rules universal in their scope and application, and prohibiting the forbidden acts by all persons whomsoever, under all circumstances, and in all places throughout the Dominion; and not merely of local application for the abatement or prevention of local evils. And all this, be the effect what it may, on the maxim *Nemo debet bis puniri pro uno delicto*.

ED. C. L. T.

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THE MARRIAGE LAWS OF CANADA.

Chief Justice R. M. Meredith, in his judgment in *Peppiatt* v. *Peppiatt*, delivered on May 19th last, uses language which should at least lead to the question of the constitutional validity of our provincial statute, originally enacted in 1907, but now to be found in R. S. O. 1914, ch. 148, sec. 36, being carried to the Court of final resort. This enactment is as follows:—

> 36(1) Where a form of marriage has been or is gone through between persons either of whom is under the age of 18 years without the consent required by sec. 15, in the case of a license, or where, without a similar consent in fact, such form of marriage has been or is gone through between such persons after a proclamation of their intention to intermarry, the Supreme Court, notwithstanding that a license or certificate was granted or that such proclamation was made and that the ceremony was performed by a person authorized by law to solemnise marriage, shall have jurisdiction and power in an action brought by either party, who was at the time of the ceremony under the age of 18 years, to declare and adjudge that a valid marriage was not effected or entered into;
>
> Provided that such persons have not after the ceremony cohabited and lived together as man and wife, and that the action is brought before the person bringing it has attained the age of 19 years.
>
> (2) Nothing in this section shall affect the excepted cases mentioned in sec. 16 or apply where, after the ceremony, there has occurred that which, if a valid marriage had taken place, would have been a consummation thereof.

Peppiatt v. *Peppiatt* is an action brought by Ruth Peppiatt, an infant, by her mother and next friend, Elizabeth Wright, against Cecil E. Peppiatt, both parties being under 21 years of age. The plaintiff and defendant went through a form of marriage on or about July 16th, 1913, without the parental consent required, in the case of Ruth, by R. S. O. 1914, ch. 148, sec. 15, she being at the time under 18. They never lived together. Ruth Peppiatt is asking for a declaration by the Court that a valid marriage was not effected, and for such other relief as the Court may deem proper. The case came on for trial before Chief Justice Meredith on

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April 9th last, who, on May 19th referred it to a Divisional Court. In his written reasons for so doing the learned Judge says:—

> "This is another of those cases which, though of infrequent occurrence in this province, invariably, indeed necessarily, direct attention to the uncertain and unsatisfactory state of the marriage and divorce laws of Canada whenever they do occur: uncertain and unsatisfactory not only in the conflicting and indecisive character of the case law upon the subjects, but equally so of the statute law; and so it has been for many years, notwithstanding the fact that it is a thing regarding which it is of the utmost importance, not only to the persons directly concerned, but to the public as well, that there should be certainty and certainty of a satisfactory character. This case affords ample proof of all this, though other cases may afford much more. How can it be but unsatisfactory for man and woman to be uncertain whether they are really husband and wife; whether they were lawfully married to one another; as well as whether any of the ordinary Courts of law have any power to settle the question? The conflict of judicial opinion in the Courts of this province has been over the question whether its Courts have any power to decree that sort of divorce which follows a finding that the marriage was not a valid one; or to pronounce a declaratory decree as to the validity or invalidity of the marriage. The cases are very much opposed to one another, or rather, the expressions of judicial opinion in them are; and they are the less helpful as none of them was ever carried to a Court of Appeal."

That the cases as to the jurisdiction of the provincial Courts, apart from the enactment above referred to, to declare that no valid marriage has taken place, are conflicting and indecisive is unquestionable. In *Lawless* v. *Chamberlain*,[1] Boyd, C., pronounced in favour of such jurisdiction when the alleged marriage is void *de jure* by reason of the absence of some essential preliminary, as, e.g., no free consent. But on the facts, he refused to exercise such jurisdiction. In *T.* v. *B*,[2] the same learned judge denied the jurisdiction of the Courts to declare a marriage void on the ground of impotency: obviously quite a different case. In *A.* v. *B*,[3] Clute, J., denied all such jurisdiction to declare an alleged

[1] 18 O. R. 296.
[2] 23 O. L. R. 224.
[3] 23 O. L. R. 261.

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marriage void; and so did Lennox, J., in *Prowd* v. *Spence*.[4] In *May* v. *May*,[5] a Divisional Court denied any jurisdiction in the Courts to declare a marriage void on the ground that the parties were related within the prohibited degrees, and expressed doubt as to the constitutionality of the above provincial enactment. In *Hallman* v. *Hallman*,[6] Lennox, J., followed the decision of Clute, J., in *A.* v. *B.*, *supra*. Lastly, in *Malot* v. *Malot*,[7] Lennox, J., refused to apply the provincial enactment on the evidence, and because he doubted its constitutionality.

Now in *Peppiatt* v. *Peppiatt* the constitutionality of the provincial enactment has come up fairly and squarely, and Meredith, C.J., in the above state of the authorities, has referred the case to the Divisional Court; but he expresses his own view thus:—

> "My conclusions are that the provincial legislation in question is *ultra vires;* and that, therefore, this Court has not power under it, nor has it power otherwise, to consider the matters in question in this action."

With great respect I venture to advance some considerations leading to a different conclusion. To begin with, I submit it is really begging the whole question to call the ceremony gone through by the parties in the *Peppiatt* case a "marriage." The whole object of the provincial enactment is to say that it shall not be a marriage, and to give the Court power to declare that it was not a marriage. In the same way it is strictly speaking an abuse of terms to call the judgment of the Court under the statute a "divorce." No marriage, no divorce.

Now the Privy Council in *In re Marriage Legislation in Canada*[1] has decided that the Dominion legislative power over "marriage" does not cover the whole field of validity; but that the provincial power over 'solemnization of marriage in the province, "*enables the provincial legislature to enact conditions as to solemnization which may affect the validity of the contract.*" The whole question, therefore, I submit, so far as regards the constitutionality of the pro-

[4] 24 O. W. R. 329.
[5] 22 O. L. R. 559.
[6] 5 O. W. N. 976.
[7] 24 O. W. R. 884.
[1] [1912] A. C. 880. This is the case I mean to refer to in Canada Federal System, p. 319: not *Watts* v. *Watts*, although I must admit that I invite the mistake.

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vincial enactment above set out, resolves itself into whether the requirement of the parental consent is to be considered as part of the marriage ceremony or not. If it is to be so considered then under the provincial power the legislature would seem entitled to exact it as part of the solemnization of marriage in the province; and to enact that there shall be no valid marriage in the province without it. Now it appears well settled that parental consent when required is to be considered part of the form or ceremony of marriage. See *Sottomayor* v. *De Barres*.[2] And so Mr. Dicey in his Conflict of Laws says:[3] 'The consents of and the notices to parents or others, necessary by many laws to the validity of a marriage are considered as part of the form or ceremony of the marriage. . . . This doctrine is now fully established by decided cases.'

In England lack of parental consent does not invalidate the marriage itself;[4] but this, of course, has no bearing on the question of the powers of our provincial legislatures under the British North America Act.

As to the general jurisdiction of the Court I would like to say this: there is one form of mistake,—a very curious form too—which all the books tell us is fatal to the validity of the marriage contract, namely, mistake as to the person whom one intends to marry. Thus Bishop on Marriage[5] says:—

> 'However difficult may be the supposition that one intending to marry A. can, without a fraud being practised on him, marry B., yet if the fact were established there is no doubt the marriage would be invalid. Lord Campbell gives the case of marriages in masquerade where the parties are entirely mistaken as to the persons with whom they are united as clearly void.'

I cannot find a concrete case anywhere referred to. Even the authentic case of Jacob and Leah was not one of pure mistake, if I remember right. There was at all events contributory negligence on Jacob's part. But the following was recently reported in the newspapers under date Pittsburg, January 5th, 1906, and it may relieve the monotony of this discussion to place it on record.

[2] (1877) 3 P. D. 1. 7.
[3] 2nd ed. p. 616.
[4] *Rex* v. *Birmingham* (1828) 8 B. & C. 29.
[5] Vol. 2. sec. 533, citing *per* Lord Campbell in 10 Cl. & F., at p. 785. See, also, *per* Sir F. Jeune in *Moss* v. *Moss* [1897]. p. 263.

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'Hyde J. Summers, formerly of Pittsburg, now of Olcott, N.Y., has begun proceedings to annul his marriage, alleging he led the wrong girl to the altar.

Summers says he offered himself in marriage to Ruth Bekman and was accepted. Ruth, the complaint says, had a twin sister named Irene, and the two were identical in appearance.

Several days before the wedding, Summers avers, he requested his wife to play the piano and sing for him. She played indifferently, he alleges, and could not sing. This aroused his suspicions, as he knew that Ruth possessed a clear soprano voice.

On this statement he seeks to prove his wife is Irene, and not Ruth. The defendant denies any error has been made and declares she can sing with ability. The whole case will pivot on this point.

Summers cites an instance when Irene accompanied him to a theatre in Buffalo as a joke, he believing she was Ruth.'

Is there any reason to suppose that if such a case had arisen in England, before the establishment of a Divorce Court, the Court of Chancery would not have had jurisdiction to declare that there had been no valid marriage, though it might yield to the Ecclesiastical Courts exclusive jurisdiction as the special tribunals for matrimonial causes. So now the proceedings might have to be taken in the Probate, Admiralty and Divorce Division.

But leaving the subject of marriage for the unhappily kindred subject of divorce, can it be said that the Divorce law of Canada is satisfactory? There is, I submit, a plain inconsistency in any community acknowledging through its representative Parliament that divorce is under certain circumstances, right and proper; and yet permitting the necessary procedure to obtain it to be such that the poor man is debarred from pursuing it. It is commonly supposed that the cost of contested divorce proceedings before the Senate at Ottawa is commonly between $800 and $1,000, though sometimes a little less, and sometimes considerably more. It is true that a mode of proceeding *in forma pauperis* is recognised. But I have it from Mr. R. V. Sinclair, K.C., whose recent book on *The Rules and Practice before the Parliament of Canada upon Bills of Divorce* was noticed in the CANADIAN LAW TIMES for May, that all this means is that where the applicant is in needy circumstances, and establishes that fact

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to the satisfaction of the House an order will be made absolving him or her from payment of the initial fee of $200, exacted under the Rules of the Senate. But Mr. Sinclair writes:—

> "The applicant has to pay for his preliminary advertising, and for the service of his papers on the respondent, has to pay the cost of bringing his witnesses, and has to pay his solicitor and counsel. The Senate committee does not appoint any member of the bar to represent a pauper applicant. The proceeding is not peculiar to divorce applications. Payment of the fee is quite often relieved against in other cases of private legislation, where the applicant is poor, and very often where the object of private legislation is of a benevolent or charitable nature. Where a wife is desirous of opposing her husband's application for divorce, and is without means to do so, the present practice is for the committee to determine at the hearing whether and to what extent the husband should be required to advance money to enable the wife to oppose his application. The committee usually hears the evidence on behalf of the husband up to a certain point and then requires the wife to establish by statutory declaration the nature of her proposed defence and the nature of the evidence which will be adduced by the several witnesses whom she proposes to call and upon consideration of the facts so proved by her, the committee determines the amount which the husband shall be required to contribute. The practical result is that where an indigent person seeks a divorce, the only relief which he can obtain by asking leave to proceed *in forma pauperis* is to be absolved from payment of the House fee of $200."

However, the position of matters is not so monstrous as it was in England when old Judge Maule delivered his famous judicial utterance on the subject. I will give it in full for the benefit of those readers of the CANADIAN LAW TIMES who may not be familiar with it. In 1845, when it was delivered, no one save a man of means could obtain a divorce, for it was necessary first to secure a judgment for damages against the adulterer at law, and then to take proceedings in the Ecclesiastical Court for a divorce *a mensa et thoro*. And only after this could a divorce *a vinculo* be obtained by privvate Act of Parliament. At the Warwick Assizes in 1845, Maule, J., tried the case of *Regina* v. *Hall*, the charge being bigamy. The jury had no difficulty in finding the prisoner

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guilty, but, before sentence, it was urged in mitigation that the man had been a good husband and father, that he was an honest, sober, and industrious man,—whereas his wife was a shrew, a drunkard, and had left her home, taking her children with her, and had gone to live with another man. Nothing further remained save for the judge to do his duty, and vindicate the majesty of the law, which he did in this fashion, after some preliminary remarks:—

> "Prisoner at the bar, I will tell you what you ought to have done, under the circumstances of your case. You may say you did not know what to do, but let me inform you that the law conclusively presumes that you did. Instead of going to a parson, you should have gone to an attorney, to bring an action against the betrayer of your wife for damages. That would have cost you £100. You were probably not worth as many pence; but that is what you should have done. Having proceeded thus far, you should have procured a proctor, and instituted a suit in the Ecclesiastical Courts for a divorce *a mensa et thoro;* that would have cost you £200 or £300 more. Then when you had obtained a divorce *a mensa et thoro,* you had only to procure a private Act of Parliament for a divorce *a vinculo matrimonii.* The Bill might possibly have been opposed in all its stages in both Houses of Parliament,[6] and altogether that would have cost you £1,000. You will probably say you never had a tenth part of that sum. But sitting here as an English judge it is my duty to tell you that this is not a country in which there is one law for the rich and another for the poor. The sentence of the Court is that you be imprisoned for ..... one day."

As the prisoner had been in custody for a longer period he was at once discharged, no doubt a wiser man.[7]

In 1858 a Court of Divorce and Matrimonial Causes was established in England. May we not hope that one will be established in Canada by 1918 at all events.

A. H. F. LEFROY.

[6] So too here.
[7] "Reminiscences of a K. C.", pp. 159-160.

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ONTARIO STATUTES 1915.

The statutes passed by the Legislature in its last session are not of much interest from a professional point of view. After the usual *Supplies Act* (ch. 1) and an Act declaring the boundaries of the Electoral Districts of London, East Middlesex, East Hamilton, and South Wentworth (ch. 2), comes the *Provincial War Tax Act, 1915* (ch. 3). This provides that in every municipality separated from the county for municipal purposes and in every County municipality and in every County there shall be levied and collected annually by a special rate an amount equal to one mill in the dollar on the total value of all the rateable property as a Provincial War Tax. *The Succession Duty Act 1915* (ch. 10), increases the severity of the Succession Duty Act by providing that all estates the aggregate value of which exceeds $5,000, (instead of $10,000) shall be liable; and property passing to ascendants, descendants, sons-in-law and daughters-in-law over $25,000 in value shall be liable, (instead of $50,000); other amendments being made in line with these. Chapter 8 amends the *Corporations Tax Act, 1914,* and provides, *inter alia,* that every Insurance Company shall pay a tax of $30,000. It also amends the clauses providing for the taxation of Gas and Electric companies. Chapter 13 amends some sections of the Mining Act; and ch. 15 some sections of the *Rivers and Streams Act;* and ch. 17 adds many supplemental provisions to the *Highway Improvement Act,* R. S. O. 1914, ch. 40. Chapter 18 is an Act incorporating the Toronto and Hamilton Highway Commission with power to survey, lay out, construct and maintain a permanent roadway from the western limits of the City of Toronto, to the City of Hamilton, and with the right to exercise within the limits of any municipal corporation along the course of the roadway all the powers which may be exercised by a municipal corporation authorised to lay out and construct a highway. The Commission may also make regulations respecting the use of the roadway by any class of vehicles or animals, and impose penalties, subject to approval by the Lieutenant-Governor in Council. For the purpose of providing for the cost of the construction of the roadway the Commission may issue debentures to an amount not exceeding in all $600,000, the payment of which

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is guaranteed by the Province, and is to be met by contributions specified from the various municipalities concerned. Chapter 19, being the *Power Commission Act 1915,* makes several amendments to the *Power Commission Act,* R. S. O. 1914, ch. 39, and adds provisions for the establishment of a Commission in every city or town under contract with the Power Commission for the control and management of all works undertaken by the corporation for the distribution and supply of electrical power or energy. Chapter 20 is the annual *Statute Law Amendment Act.* The only sections of this statute which require special notice here seem to be sec. 10, by which it is provided that sec. 31 of the Execution Act be amended by adding the following sub-section:—

(3) 'Where more mortgages than one of the same lands have been made to the same mortgagee or to different mortgagees, sub-secs. 1 & 2' (which provide for sale by the Sheriff of an equity of redemption) 'shall apply, and the equity of redemption shall be saleable under an execution against the lands and tenements of the owner, subject to the mortgages in the same manner as in the case of land subject to one mortgage only;'

and sec. 16, which adds a section to *The Infants Act,* providing that:—

'The Court, if it is of opinion that such course is for the benefit of the infant or that his interest requires it or will be substantially promoted thereby, may from time to time authorise the exchange of any lands held in fee or for a term of years or otherwise by such infant, and which are unproductive, but no such exchange of lands shall be made contrary to the provisions of a will or conveyance.'

Chapter 21 amends the *Mortgages Act,* R. S. O. 1914, ch. 112, sec. 11, by adding a sub-section providing for payment into Court when payment to a mortgagee is impossible 'owing to the whereabouts of the mortgagee or of one or more of several mortgagees or other person or persons entitled to receive such payment or to give such discharge being unknown or for some other cause.' Chapter 22 is the *Moratorium Act* now figuring as *The Mortgagors and Purchasers Relief Act, 1915.* We noticed the opening sections when it was in the Bill stage (*supra,* pp. 195-6) which have been very little altered. A subsection has been added bringing within the scope of the Act proceedings for the rescission of or for the recovery of damages for the breach of any contract involving the expenditure

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of money in providing improvements or services upon lands or for the common benefit of the owners of lands laid out in building lots, upon the grounds that default has been made when the date at which such expenditure should have been made or such improvements or services made or provided is later than August 4th, 1914. It is also provided in the Act that nothing in it shall apply to or affect any right or remedy now exerciseable for the enforcement of any mortgage or other security of a like nature made or entered into for the purpose of securing the bonds or debentures of any corporation. It is further provided that—

'Where default is made in payment of interest, rent, taxes, insurance or other disbursements which the mortgagor or purchaser has covenanted or undertaken to pay, the mortgagee or vendor, his assignee, or personal representative shall have the same remedies, and may exercise them to the same extent, and the consequences of such default shall in all respects be the same as if this Act had not been passed. . . .'

Chapter 23, the *Charities Accounting Act, 1915,* provides for persons administering Charitable gifts being required to account to the Attorney-General or Official Guardian for their dealings in the matter.

Chapter 24 amends sections of the *Workmen's Compensation Act* too numerous to mention here. It gives, *inter alia,* any assessment and compensation under the Act priority under the *Assignments and Preferences Act,* the *Trustee Act,* and the *Ontario Companies Act,* where the liability accrued before the date of the assignment or death, or before the date of the commencement of the winding-up. Section 2 amends sec. 6 of the principal Act which provides for compensation 'where an accident happens while the workman is employed elsewhere than in Ontario which would entitle him or his dependants to compensation if it had happened in Ontario.' The constitutionality of this provision is, we think, open to some question.

Chapter 25, *The Workmen's Compensation Insurance Act, 1915,* gives a workman who has recovered damages against his employer a direct claim on insurance moneys payable to his employer and 'the insurance shall be deemed to be for and enure to the benefit of the workman.'

Chapter 33, *The Telephone Amendment Act, 1915,* makes many amendments in the *Ontario Telephone Act,* R. S. O. 1914, ch. 188; as does ch. 34 in the Municipal Act, none of

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them, however, seem to require special mention here. *The Local Improvement Act,* R. S. O. 1914, ch. 193, and the *Assessment Act,* R. S. O. 1914, ch. 195, and the Liquor *License Act,* R. S. O. 1914, ch. 215, are also amended by chs. 35 & 36 & 37 respectively. Chapter 37, moreover, provides for the establishment of a Board of License Commissioners for Ontario, to be composed of five persons to be appointed by the Lieutenant-Governor in Council. The Board is to have jurisdiction throughout the Province, and subject to the provisions of the Act and of the Regulations made under the Act is to have the like powers and perform the like duties throughout the Province as those now exercised or performed by the local boards.

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CURRENT COMMENTARY UPON ENGLISH AND CANADIAN DECISIONS.

ENGLISH DECISIONS.

Frauds on Powers. The first case in the April *Law Journal Reports* is *Vatcher* v. *Paull*,[1] a decision of the Privy Council upon appeal from a judgment of 'the Superior Number of the Royal Court of the Island of Jersey' upon a subject not seen often up in our Courts, namely, frauds upon powers. The question was whether an appointment under a power in a marriage settlement, made in favour of proper objects of the power, but subject to a defeasance on performance of a condition by certain third parties, over whom the appointees had no control, with the intention that on performance of the condition the funds should go as on default of appointment—was invalid as a fraud on the power. The Board holds that it was not, there being no intention to secure a benefit for some person not an object of the power. Lord Parker delivering the judgment says (p. 89):—"The term 'fraud' in connection with frauds on a power, does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common law meaning of the term, or any conduct which could be properly termed dishonest or immoral. It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of, or not justified by the instrument creating the power. . . . It is enough that the appointor's purpose and intention is to secure a benefit for himself, or some other person not an object of the power. In such a case the appointment is invalid, unless the Court can clearly distinguish between the *quantum* of the benefit *bona fide* intended to be conferred on the appointee, and the *quantum* of the benefit intended to be derived by the appointor or to be conferred on a stranger. . . . Apart from cases of appointments made in pursuance of a bargain under which the appointor or a person not an object of the power is to derive a benefit, there is no authority for holding an appointment bad because it is made on a condition to be performed not by the appointee, but by a third party. . . . Even in the case of a condition to be performed by the appointee, the condition does not necessarily

[1] 84 L. J. P. C. 86; [1915] A. C. 372.

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invalidate the appointment. . . . It can only do so if the purpose of the appointor in imposing it is to benefit himself or a third person not an object of the power."

There are three other minor points touched by the judgment. (1) The first is the general presumption which the law makes, and on which their lordships act, "in favour of the good faith and validity of transactions which have long stood unchallenged, and if the known fact and existing documents are, though such as to give rise to suspicion, nevertheless capable of a reasonable explanation, the Court ought not to draw inferences against the integrity of persons who have long been dead and cannot therefore defend themselves:" (2) this is one of the exceptional cases in which the Board overruled concurrent findings of fact in the Courts below. There were of course special reasons, one of which was that there was no oral evidence at the trial. "All the evidence was taken on deposition, and the Courts below were in no better position to judge of its effect than is their lordships' Board": (3) the judgment states that "their lordships are of opinion that where charges of fraud are intended to be made full particulars thereof ought to be given in the pleadings, either as originally framed or as amended for that purpose."

Government House Property. Attorney-General for New South Wales v. *Williams*,[2] terminates a curious domestic dispute of New South Wales. Since 1845, and before, a certain portion of Crown property at Sydney had been appropriated to the purposes of a Government House and grounds, first for the Governor of New South Wales, and since Federation for the Governor-General of the Commonwealth; and the question brought up upon the information of the Attorney-General of New South Wales was whether the State Government could now without legislative Act, divert the property to other uses. The Board affirm the decision of the High Court of Australia, that it could do so. Their lordships say that whether or not the Government House and its grounds were included in the 'waste lands' of the Crown in New South Wales the management and control of which were by the (Imperial) Constitution Act of 1855, vested in the legislature of the Colony,—"It cannot be said, saving always the rights of the Crown of the United Kingdom, that anything illegal or even irregular has been done *qua* the people of New South Wales

[2] 84 L. J. P. C. 92; [1915] A. C. 573.

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if the Governor has exercised his authority, as the officer of the Crown, in respect of property, held by the Crown in right of the United Kingdom, upon the advice and by the ministration of the Ministry of New South Wales. There is nothing which requires him to act in such a matter by a solitary determination or by his own single effort. Though the personal intervention of the Governor is not shewn in the present case, and even if it be assumed that it was absent, the action taken is that of the Executive, and is within its competence on either hypothesis as to the construction of the Constitution Act," i.e., the Act of 1855. They point out that it was not a case of permanent alienation. In the course of their judgment their lordships make the curious remark:—"Whatever jurisdiction there may be in certain events to consider judicially the effect of ministerial acts when a Governor is not in accord with Ministers, or of a Governor's acts if Ministers have not advised them, no question of invoking such jurisdiction arises here."

Time of Essence. *Stickney* v. *Keeble*,[3] is a very important decision of the House of Lords, if, as it seems to do, it re-establishes the binding efficacy of a clause in a contract for the purchase and sale of land, expressly making the time for completion of the essence of the contract. Lawyers will remember that *Kilmer* v. *British Columbia Orchard Lands Ltd.*,[4] was a decision of the Privy Council, and therefore not binding on the House of Lords, or in fact on any English Court, in which the Board held that under the law of England a condition of forfeiture, in such a contract, for non-payment of purchase money in instalments at specified dates, was, although time was made of the essence of the contract, in the nature of a penalty from which the purchaser was entitled to be relieved on payment of the purchase money. It was on the strength of this decision, and of another case in the Court of Appeal in England, that in *Boyd* v. *Richards*,[5] Middleton, J., refused to follow the Divisional Court decision in *La Belle* v. *O'Connor*.[6] The judgment of the Privy Council will of course continue to bind our Courts, notwithstanding the House of Lords, but the result seems to be a cleavage on the point between English case law and our own,

[3] 84 L. J. Ch. 259; [1915] A. C. 386.
[4] [1913] A. C. 319.
[5] (1913) O. L. R. 119.
[6] (1908) 15 O. L. R. 519, 546.

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unless the legislature intervenes. All this is on the assumption that if an express clause making time of the essence in regard to payment of purchase money can be relieved against in Equity, so can an express clause making time of the essence in regard to completion. And now as to *Stickney* v. *Keeble*, we need not deal with it so far as it turned on facts, but on the point of law, Parker, J., with whom Lord Loreburn expressly, and the other Lords impliedly, concur, says, at p. 268:—"In a contract for the sale and purchase of real estate, the time fixed by the parties for completion has at law always been regarded as essential. In other words, Courts of law have always held the parties to their bargain in this respect, with the result that if the vendor is unable to make a title by the day fixed for completion, the purchaser can treat the contract as at an end and recover his deposit with interest and the costs of investigating the title. In such cases, however, equity having a concurrent jurisdiction did not look upon the stipulation as to time in precisely the same light. Where it could do so without injustice to the contracting parties it decreed specific performance notwithstanding failure to observe the time fixed by the contract for completion, and as an incident of specific performance relieved the party in default by restraining proceedings at law based on such failure. This is really all that is meant by and involved in the maxim that in equity the time fixed for completion is not of the essence of the contract; *but this maxim never had any application* to cases in which the stipulation as to time could not be disregarded without injustice to the parties—*when, for example, the parties, for reasons best known to themselves, had stipulated that the time fixed should be essential*, or where there was something in the nature of the property or the surrounding circumstances which would render it inequitable to treat it as a non-essential term of the contract. It should be observed, too, that it was only for the purpose of granting specific performance that equity in this class of case interfered with the remedy at law. A vendor who had put it out of his own power to complete the contract, or had by his conduct lost the right to specific performance, had no equity to restrain proceedings at law based on the non-observance of the stipulation as to time." He then explains that the Judicature Act has not affected the matter. We may, also, refer to Lord Parmoor's judgment at p. 271. But space does not permit us to dwell longer on this case.

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Trust funds mixed with private moneys. The well known case of *In re Hallett's Estate,*[7] decided two clear points. First, that when a trustee mixes trust moneys with private moneys in one account the *cestuis que trust* have a charge on the aggregate amount for their trust fund; and secondly, that when payments are made by the trustee out of the general account the payments are not to be appropriated against payments into that account as in *Clayton's case,*[8] because the trustee is presumed to be honest rather than dishonest, and to make payments out of his own private moneys, and not out of the trust fund that was mingled with his private moneys. But for the purposes of tracing, which was the process adopted in *In re Hallett's Estate,* you must put your finger on some definite fund which either remains in its original shape or can be found in another shape. Thus in *James Roscoe (Bolton) Ltd.* v. *Winder,*[9] W. bought the business of the plaintiff company and agreed to get in certain debts of the business and pay them over to the plaintiff company, which, Sargant, J., held, made him a trustee for the vendors of book debts so collected. He collected £455 of these debts, and paid the money into his private general account. Within two days he drew out the whole of the money to his credit in this account except £25, 18s, and applied it to his own purposes. Subsequently he operated on the account in the ordinary way, paying in and drawing out from time to time; and on his death shortly afterwards there was a credit balance of £358. Sargant, J., held that the vendors were not entitled to more than £25, 18s. of this, that being the smallest amount to which the balance had fallen between the date of payment in of the £455 and the death of the debtor, and the only sum which could be earmarked as the proceeds of the book debts. He says (p. 289):—"Apart from tracing, it seems to me possible to establish this claim against the ultimate balance of £358, only by saying that something was done with regard to the additional moneys which are needed to make up that balance by the person to whom those moneys belonged (the debtor) to substitute those moneys for the purpose of, or to impose upon those moneys a trust equivalent to, the trust which rested on the previous balance. Of course if there was anything like a separate trust account, the pay-

[7] 49 L. J. Ch. 415; 13 Ch. D. 696.
[8] 1 Mer. 572.
[9] 84 L. J. Ch. 286.

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ment of the further moneys into that account would, in itself, have been quite a sufficient indication of the intention of the debtor to substitute those additional moneys for the original trust moneys, and, accordingly, to impose by way of substitution the old trusts upon those additional moneys. But in a case where the account into which the moneys are paid is the general trading account of the debtor, on which he has been accustomed to draw both in the ordinary course and in breach of trust when there were trust funds standing to the credit of that account which were convenient for that purpose, I think it is impossible to attribute to him that by the mere payment into the account of further moneys which to a large extent he subsequently used for purposes of his own he intended to clothe those moneys with a trust in favour of the plaintiffs."

Registry Act. Gresham Life Assurance Society v. *Crowther*,[10] is a decision of the Court of Appeal under the Yorkshire Registries Act, 1884, which would apparently apply *a fortiori* to our Ontario Registry Act. The point decided is that an incumbrancer on an interest in the proceeds of sale of real estate in Yorkshire settled upon trust for sale, but with power to postpone conversion, obtains no priority over prior incumbrancers of such interest by registering his mortgage deed, and the priorities of such incumbrancers are determined by the dates of their respective notices to the trustees; and this is so, although the land in fact is not sold. The following passage from the judgment of Swinfen Eady, L.J., (p. 318), makes the whole matter clear:—"The question is whether a dealing with a share or interest in proceeds of sale of land in Yorkshire, conveyed upon an absolute trust for sale, requires registration under the Yorkshire Registries Act, 1884. Under that Act by sec. 4 'all assurances . . . by which any lands within any of the three ridings are affected may be registered under this Act,"[11] and then by sec. 14 all assurances entitled to be registered are to have priority according to the date of registration.[12] It is clear from the

[10] 84 L. J. Ch. 312.

[11] R. S. O. 1914, ch. 124, secs. 2 (b), 33, permits registration of certain named instruments and—'every other instrument whereby land may be transferred, disposed of, charged, incumbered, or affected in any wise, affecting land in Ontario.'

[12] R. S. O. 1914, ch. 124, sec. 72—'Priority of registration shall prevail unless before the prior registration there has been actual notice of the prior instrument, by the person claiming under the prior registration.'

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rest of sec. 14 that assurances of equitable, as well as legal, interests are within the Act. The question is whether the assurance of a share of the proceeds of sale of the land is within the Act. Land is defined thus: 'The expression "land" includes lands and tenements and hereditaments, corporeal or incorporeal, and houses and other buildings, and also an undivided share in land,'[13] and 'the expression "conveyance" includes any assignment' and so on, by which 'any interest in land is thereby conveyed.' The question is whether a share or interest in the proceeds of sale of land is an interest in land within the meaning of the Act. It is quite clear, as counsel for the appellant has urged, that it may be and is for many statutes and for many purposes an interest in land. . . It might be an interest in land within the Dower Act or within the Statute of Limitations. The question is whether it is an interest in land within the meaning of the Yorkshire Registries Act, 1884. In my opinion this statute is intended to apply to dealings both at law and equity which affect the land itself. In the present case the trustees for sale could make a good title quite independent of and without the concurrence of the persons interested in the proceeds, or entitled to any share in the proceeds, or their mortgagees; and a person entitled to a share in the proceeds of the land had, in my opinion, no interest in the land itself within the meaning of this statute."

Excavation adjoining road—Duty of possessor to fence. The matter decided in *Attorney-General* v. *Roe*,[14] may be given best in the following extract from the judgment of Sargant, J.: "It seems clear that there is a common law obligation on the possessor of a dangerous excavation by the side of the highway to keep it fenced off whether the excavation was or was not there before his possession began. . . . Again, as regards nuisance on or by the highway, the obligation of the actual occupier is clear whether he is or is not liable to his landlord, if any. And in *Attorney-General* v. *Tod-Heatley*,[15] this obligation was enforced by injunction." He cites other authorities. We may refer in connection with

[13] R. S. O. 1914, ch. 124, sec. 2 (c) '"Land" shall include lands, tenements, hereditaments, and appurtenances and any estate or interest therein.'

[14] 84 L. J. Ch. 322.

[15] 66 L. J. Ch. 275; [1897] 1 Ch. 560.

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this case to the recent case in our own Courts of *Heward* v. *Lynch*.[16]

Consignment of goods at 'owner's risk'—Non-delivery of part. In *Wills* v. *Great Western Railway*,[17] a consignment note 'at owner's risk' of cattle by the defendant railway, provided that the railway company should be relieved from liability for loss (*including non-delivery*) with the exception of non-delivery of any package or consignment fully and properly addressed, unless such non-delivery were due to accidents to trains or fire. The Court of Appeal held that it was not necessary in order to make the company liable that there should be total non-delivery of the consignment; they were liable if a part of the consignment was not delivered. Phillimore, J., dissenting, held that, in the peculiar wording of the consignment note in question, 'non-delivery' meant absence of delivery, and not shortage in delivery, which he thought was otherwise provided for in it.

Infant—Necessaries—User of hired motor car beyond limit contracted for. In *Fawcett* v. *Smethurst*,[18] an infant, 20 years of age with an allowance of £80 a year, hired a motor car of the plaintiff at his own risk, as the plaintiff alleged, for the purpose of driving to a place six miles off to fetch a bag which he had left there. On arriving there he met a friend whom he drove to a place twelve miles off, and on the return journey, without any negligence on the defendant's part, the car caught fire and was injured beyond repair. Atkin, J., held the defendant not liable, and his judgment covers two points of interest: (1) he holds that though the hire of the car for the original purpose might be a contract for a necessary,—"I do not think it follows that such a contract would be one for a necessary if it contained an onerous term, such as that which the plaintiff alleges was embodied in the contract before us. The effect of the contract alleged by the plaintiff would be to impose upon the defendant an absolute responsibility in respect of this car, whether it was damaged owing to his negligence or to any other conceivable cause. In my opinion a contract containing such a term would not be a reasonable one for a

[16] 6 O. W. N. 388.
[17] 84 L. J. K. B. 449.
[18] (1914) 84 L. J. K. B. 473.

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young man in the defendant's position to make in regard to a journey of five or six miles to fetch his bag, and I do not think that such a contract would be one for a necessary."

Secondly, and in reference to the total loss of the car, Atkin, J., applied the principle thus laid down in Pollock on Contracts,[19] that an infant 'cannot be sued for a wrong when the cause of action is in substance *ex contractu,* or is so directly connected with the contract that the action would be an indirect way of enforcing the contract—which, as in the analogous case of married women, the law does not allow.' Atkin, J., says: "In my opinion nothing that was done upon that further journey made the defendant an independent tort-feasor; and, if any damage was done to the car on that journey, the defendant would only be liable if he were liable under the contract made. The extended journey was of the same nature as the original one, and the defendant did no more than drive the car further than was originally intended."

Interpleader—Goods partnership property of claimant and execution debtor. The short point decided in *Flude, Lim.* v. *Goldberg,*[20] is that when on trial of an interpleader issue the jury finds that the goods claimed are not the goods of the claimant, but are the property of a partnership in which he and the execution debtors are the partners, the issue as between him and the execution creditors should be determined in favour of the claimant. As Ridley, J., says:—"Isaacs" (the claimant) "made a claim that the goods were his, and he repeated that claim in his affidavit and particulars of claim. That was a claim that they were his as against the execution creditors. . . . Execution cannot issue against partnership property except on a judgment against the firm, which, of course, this judgment was not. Therefore execution could not issue against these goods, and it follows from that that there could not be judgment in favour of the execution creditors."

Master and Servant—Suspension from work. Hanley v. *Pease and Partners Ltd,*[21] illustrates in a striking way the technicality necessarily inherent in law if there is to be any law at all. A workman absented himself without leave for a

[19] 8th ed. p. 78.
[20] 84 L. J. K. B. 511; [1915] 2 K. B. 157.
[21] 84 L. J. K. B. 532; [1915] 1 K. B. 698.

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day. His employers, therefore, suspended him from work for the following day only. He took proceedings against them for wrongful dismissal, and the full Court unanimously decided in his favour, and that he was entitled as damages to the wages he lost by his day's suspension. Lush, J., puts the grounds of the decision very clearly (p. 534):—

> "Whether you treat the right of the master to dismiss the servant as a right to put an end to the contract, where there has been repudiation of that contract on the part of the servant, or as a right to consider the misconduct of the servant as a breach of a condition of the contract, is immaterial, because in either view the right of the master is merely to exercise an option. The contract has become voidable. The master may, if he pleases, determine it, if there has been misconduct by the employee entitling him so to do. If he chooses not to exercise that right, but to treat the contract as a continuing contract, notwithstanding the misconduct of the servant, then the contract is for all purposes a continuing contract, subject, of course, to the master's right in that case to claim damages against the servant. Here, after declining to dismiss the workman, the employers took it upon themselves to suspend him for one day and to deprive him of his wages for one day, thereby assessing their own damages at the sum which the workman would have earned on that day. They have no possible right to do that, having elected to treat the contract as continuing. They might have had a right to claim damages against the workman, but they could not justify their act in suspending him for one day."

Set-off of judgments for costs—Costs in different actions. The short point decided in *Reid* v. *Cupper*,[22] is that the Court, when exercising common law jurisdiction, has, apart from any Rules of the Supreme Court, a discretionary power, which was formerly possessed by the Superior Courts of common law, to set-off against one another judgments for costs in separate independent actions. Buckley, L.J., puts the matter thus (p. 576):—

> "Before the year 1832, when the first rule I will mention came into existence—I am speaking now only of common law jurisdiction, to the exclusion of the Court of Chancery—there was recognized what was called an equitable jurisdiction—that is to say, a jurisdiction based on

[22] 84 L. J. K. B. 573; [1915] 2 K. B. 147.

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fairness—which was described by Brett, M.R., in *Edwards* v. *Hope*[23] thus: 'The Courts, however, always had an equitable jurisdiction for the purpose of preventing absurdity or injustice in cases where there had been judgments for damages between the same parties in distinct actions, to set off one judgment against the other and to allow execution to issue in respect of the balance only.'"

Railway Company—Duty towards persons using the company's premises. In *Norman* v. *Great Western Railway*,[24] which is the last case in the April reports of English decisions requiring notice here, the question of law involved was whether the duty of a railway company towards persons coming upon their premises as of right to do business with them is any higher than, or different from, that of an occupier of private premises, towards persons whom he invites to come upon them. The Court of Appeal decided that it was not. It is not necessary to set out the facts at length. Suffice it to say that on one side of the defendant company's yard there was a steep, unfenced bank, and the plaintiff, having driven a wagon into the yard, for the purpose of taking away some goods, left his horse unattended; and the horse backed the wagon over the bank, and was killed. The plaintiff then sued the railway for breach of duty in not having fenced the bank. At p. 602, Buckley, L.J., formulates the rules of law bearing on the matter in such a way as clearly brings out the point decided:—

"The liability of a person upon whose land another comes towards the latter in respect of not exposing him to danger may be stated in an ascending scale. The liability is lowest towards a *trespasser*. If a trespasser chooses to come upon another man's land, in which the latter has dug a hole and covered it with brushwood with a view to catch a beast, or with some other object, and the trespasser falls into that hole and is injured, he cannot complain—he had no right to be there; if he goes there he must take the consequences. The next case is that of the *licensee*. He is allowed to come on the premises, and he must take them as they are, but the occupier must not expose him to a hidden peril. If the occupier knows of a danger upon the premises he must warn the licensee: he

[23] 54 L. J. K. B. 379; 14 Q. B. D. 922.
[24] 84 L. J. K. B. 598.

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owes to the licensee a duty of not laying a trap for him. Next in the ascending scale is the *invitee*. The illustration commonly given is that of the shopkeeper, who tacitly invites persons, by means of the business carried on at his shop, to come in and deal with him. . . . The duty of the invitor towards the invitee is to use reasonable care to prevent damage from unusual danger which he knows or ought to know. If the danger is not such that he ought to know of it, his liability does not extend to it. It is suggested that there is a fourth class in this ascending scale. If the invitor be a person who is not correctly described as an invitor, it is said that because he is bound to admit persons to his premises, he therefore owes a still higher duty. A railway company is *a person* to whose stations a member of the public is *entitled to have access* if he wants to travel by or make use of the railway. . . . In such case there is not, properly speaking, any invitation. The passenger or owner of the goods comes there as of right. Is there a higher duty in that case owing to the invitee? In my opinion there is not. There is nothing either in principle or authority to shew that when a person comes reasonably and properly upon the premises of another as of right, as distinguished from by invitation, these is any higher obligation in the person on whose premises he comes than exists in the case where that person issues an invitation."

The other judges are of the same opinion, but Phillimore, L.J., at p. 605, adds the useful caution that—"in analysing the expression 'reasonably safe' you must take into account what is called in modern parlance the personal equation: what may not be safe for a certain man may be safe enough for the class of experts who frequent particular business premises."

A. H. F. L.

Canadian Cases.

Alien Enemy—Costs. In *Rystrom* v. *Krom*,[1] Macdonald, J., of British Columbia decided that successful alien enemy defendants were entitled to their costs of suit. It is clear that an alien enemy may appear and defend when proceedings have been instituted against him; the right to costs seems to follow. Possibly a distinction would be made and

[1] (1915) 31 W. L. R. 7.

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costs be withheld until after the declaration of peace should the alien enemy reside beyond the King's Dominions. However as costs go to the litigant's solicitor and counsel who cannot be alien enemies there is perhaps little value in this distinction.

Discretion of Taxing Officers. Re Phillips v. *Whitla* (No. 4),[2] is a decision of the Manitoba Court of Appeal setting at rest a solicitor and client taxation which went twice before the Taxing Officer, three times before various single judges on appeal and twice to the Court of Appeal. The solicitors who had special knowledge of the matter in question were engaged to act for a client who was suing to recover property worth $155,000. Soon after the action was commenced the client expressed a willingness to settle for $65,000 but the solicitors proceeded and recovered $90,000 additional; and also secured a reconveyance of the land with a Torrens title (which it did not before possess) in respect of which the defendants had paid $487. They further obtained a return of $3,875 claimed as commission, and succeeded in eliminating a set-off for interest of $2,100 claimed by the defendants. The solicitors' fee on settlement was $9,500. This was reduced by the Taxing Officer to $7,976.44; or about 5 per cent. on the $90,000. On appeal the bill was ordered to be itemized. This was done, but fee on settlement appeared as $8,480. The taxing officer reduced this to $3,500. The client appealed first to a single judge, then to the Court of Appeal, who allowed the appeal and referred the matter back for taxation in respect of the item of $3,500. The taxing officer heard the evidence of three of the leading practitioners in Winnipeg, Messrs. A. J. Andrews, Isaac Pitblado and E. Anderson who considered that a fee of $4,500 to $5,000 would be reasonable, and, relying on the following item of the Manitoba Tariff—"when it is proved that proceedings have been taken out of Court to expedite proceedings, save costs or compromise actions an allowance to be made therefor in the discretion of the taxing officer," he again allowed the charge of $3,500. On appeal Galt, J., refused to interfere; but on a further application to the Court of Appeal this amount was reduced to $1,000. The Court found that the actual time spent on the settlement was about 10 days, though negotiations extended over a longer period, and

[2] (1915) 25 M. R. 173.

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fixed on a sum equivalent to a $100 per day counsel fee as a fair amount. It was further held that the evidence of members of the profession was not properly receivable to guide the taxing officer in the exercise of his discretion. No order was made as to costs.

General Powers—Remoteness. In a note to an article on *General Powers* by Mr. J. H. Thorndike in the Harvard Law Review for May (noticed *infra.* p. 544) the Ontario case of *Re Phillips*,[3] decided by Mr. Justice Middleton, is commented on. The learned writer states that in applying the rule laid down in *Wollaston* v. *King* and *Morgan* v. *Gronow* a strange confusion was made. The testator, who died in 1910, gave his residuary estate in trust for his wife during her life or until her second marriage, and, after her death or marriage, in trust for his children then alive in equal shares, the issue of any then deceased child standing in its parent's place, with direction to pay to each of them the income of his or her share, and on the death of each to pay over his or her share as such child or grandchild should by will appoint, and in default of appointment to the persons entitled to his or her personal estate by statute in case of intestacy. He left surviving him a wife and seven children, all of whom seem to have been still alive. Mr. Thorndike says: "It is plain that, if a grandchild born after the testator's death should become entitled to a share, the limitation of his share to objects to be ascertained by his will or otherwise at his death would be too remote, and accordingly the power would be void as to such grandchild, and the judge so held, quoting (p. 97), the passage in Halsbury's Laws of England, vol. 22, p. 355. But he went on to say that the opposite view was taken in Farwell on Powers, 2nd ed., p. 287, although in fact that book expresses exactly the same view (at p. 292) as the quotation from Lord Halsbury's book, and the passage at p. 287 relates to an entirely different subject, viz., the time from which the legal period runs in the case of an appointment under a general power to appoint by will, where the power is valid. He also thought he struck "a discordant note" in *Rous* v. *Jackson*,[4] and in *Re Flower*,[5] but those cases also relate only to this latter question, and Lord Hals-

[3] (1913) 28 O. L. R. 94.
[4] (1885) 29 Ch. D. 521.
[5] (1885) 55 L. J. Ch. 200.

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bury's book at p. 356, states the law exactly in accordance with them and with Farwell on Powers. It is clear, however, that, although the power of appointment would be invalid in the case of an afterborn grandchild, this did not affect its validity as to the shares of any of the children or of grandchildren living at the testator's death, for all the shares will be ascertained at the wife's death, or marriage, and the power applies to each of them separately, according to all the cases from *Griffith* v. *Pownall*,[6] to *In re Russell*.[7] The law is stated in Lord Halsbury's book at p. 346, and is the same here *Hills* v. *Simonds*,[8]; *Dorr* v. *Lovering*.[9] But the judge somehow got the impression from *In re Bence*,[10] that the clause containing the power could not be split up, and accordingly held that the power and the alternative limitation were entirely void, and that the shares of the children and grandchildren must go to them absolutely under the original gift."

Maritime Law—Tug and Tow. The Supreme Court of Canada by a three to two judgment has laid down the principle that where a tug and tow are, through the fault of the tug, in collision with another vessel, the tow having neither propelling power, nor steering apparatus, and the navigation of both being controlled by the officers and crew of the tug, in such case the tug and tow must be regarded as one ship, and in proceedings *in rem* each is liable for the consequences of the collision and may be condemned. The tug and tow were both owned by the same person. Though the majority of the Court notice "*The American*" and "*The Syria*,"[11] where it is stated that the question of liability is not affected by the fact that tug and tow are the property of the same owners, we cannot but feel that if the ownership of tug and tow had been in different persons the decision of the Court might have been the other way and unanimous. "The *American*" and "*The Syria*" is distinguished; it would perhaps be going too far to say that it was ignored. The Chief Justice says (p. 42): "Both the defendant ships belong to the same owners and were at the time of the collision being jointly navigated for their benefit by the same crew. The

[6] (1843) 13 Sim. 393.
[7] [1895] 2 Ch. 698.
[8] (1878) 125 Mass. 536.
[9] (1888) 147 Mass. 530; 18 N. E. 412.
[10] [1891] 3 Ch. 242.
[11] L. R. 6 P. C. 127.

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servants of the owners on board the tug had possession and control of the tow by their authority. It is true that the governing power and the navigation were in the hands of the tug, but the carrying capacity upon which the profit of their joint exploitation depended was in the tow, . . . Here we have two vessels necessarily connected for the purpose of the particular business in which both were engaged for the benefit of their common owner and both in the possession and under the control of the same crew for all the purposes of their navigation. As a result of the way in which that navigation was carried on, a collision occurred to which both vessels contributed. I fail to see how we can distinguish between the vessels: "*The A. L. Smith*" and "*Chinook*" v. *Ontario Gravel Freighting Co.*[12]

Fire Insurance—Cancellation. In *Nakata* v. *Dominion Fire Ins. Co.*[13] the point considered was the interpretation of the statutory condition relating to cancellation by notice and tender. The condition which was to the same effect as the Ontario statutory condition No. 11 read: 'The insurance may be terminated by the company by giving notice to that effect, and, if on the cash plan, by tendering therewith a rateable proportion of the premium for the unexpired term. . . . Notice may be given . . . by registered letter . . . and the policy shall cease after such tender and notice aforesaid. . . .' (R. S. O. 1914, ch. 183, sec. 194). Notice of cancellation was given to the plaintiff by the Company; but no tender was made of the proportion of the premium for the unexpired term; nor was any offer made to her either directly or indirectly to return any portion of the premium. The buildings having subsequently been burnt by fire it was held by the Appellate Division of Alberta that the insured could recover on the policy; as the insurance had not been terminated. The judgment apparently suggests that if the defendant company had offered to account to the plaintiff for the premium the insurance would have been terminated. Whether the suggestion is well founded or not is immaterial for the facts in question called for no expression of opinion on that point.

Trade Marks. In the last number of the Exchequer Court Reports we have two more careful judgments by

[12] (1915) 51 S. C. R. 39, 42, 44.
[13] (1915) 31 W. L. R. 136.

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Cassels, J., on the subject of Trademarks. *In re Vulcan,*[14] disposes so far as the Exchequer Court is concerned of a troublesome dictum of Proudfoot, V.C., in *Smith* v. *Fair,*[15] and we have no doubt that the rule laid down in *Gegg* v. *Bassett,*[16] that a trade mark can not be assigned in gross and adopted by Cassels, J., in *In re Vulcan* is no longer open to doubt. It is also well settled that registration confers no title; but is a mere pre-requisite to the right to sue for infringement. The applicant for registration must be the proprietor, and applying these rules we move a step forward towards a definition of a "general trademark." By registration of a mark as a general trademark no blanket right to the user of that mark in connection with every conceivable form of article is conferred, but it would seem the mark is a general and a valid trademark only so far as there has been user. The record case of *Mickelson Shapiro Co.* v. *Mickelson Drug and Chemical Co.,*[17] decides that the written application is the important part of the description and it cannot be extended by reason of something appearing on the drawing which has not been claimed in the description. We do not think the reference to patent law very happy; for specifications there are merely illustrations. In trademark cases that which is desired is the mark as represented, not as described. It is often very difficult to draft the description so as to cover all parts of a complicated mark. The second point in this case is one which has been decided before: that the Exchequer Court has no jurisdiction in passing-off cases. It is unfortunate that such is the case; for we have here divided jurisdiction: provincial Courts being seized of one phase of the subject, Dominion Courts of the other. The matter is the more difficult because not unfrequently a plaintiff may fail in an infringement action, but on the same evidence succeed in a claim for passing-off. This divided jurisdiction, will in such case, make necessary two actions and two trials.

L. D.

We append a note of a recent Supreme Court decision.

[14] 15 Ex. C. R. 265.
[15] 14 O. R. 736.
[16] 3 O. L. R. 263.
[17] Ibid. 276.

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SUPREME COURT OF CANADA.

QUE.] [MARCH 15TH, 1915.

CANADIAN PACIFIC R. W. CO. v. PARENT AND CHALIFOUR.

Present:—SIR CHARLES FITZPATRICK, C.J., and DAVIES, IDINGTON, DUFF, ANGLIN and BRODEUR, JJ.

Railways—Shipping contract—Carrying person in charge of live stock—Free pass—Release from liability—Approved form — Negligence — Action by dependents — Conflict of laws — "Railway Act," R. S. C., 1906, ch. 37, sec. 340.

The shipping bill for live stock, to be carried from Manitoba to its destination in the Province of Quebec, was in a form approved by the Board of Railway Commissioners and provided that, if the person in charge of the stock should be carried at a rate less than full passenger fare on the train by which the stock was transported, the company should be free from liability for death or injury whether caused by the negligence of the company or of its servants. C. travelled by the train in charge of the stock upon a "Live-stock Transportation Pass," and signed conditions indorsed in English thereon by which he assumed all risks of injury and released the company from liability for damages to person or property, while travelling on the pass, whether caused by negligence or otherwise. While the train was passing through the Province of Ontario, an accident happened and C. was killed. In an action by his dependents, instituted in the Province of Quebec, it was shewn that C. could neither read nor write, except to sign his name, and that he only understood enough English to comprehend orders in respect of his occupation as a stock-man; there was no evidence that the nature of the conditions was explained to him.

Held, FITZPATRICK, C.J., dissenting, that the railway company was liable for damages in the action by the dependents.

Per DAVIES, IDINGTON, DUFF and BRODEUR, JJ. (FITZPATRICK C.J. and ANGLIN, J., *contra*), that, as C. could not have known the nature of the conditions or that they released the company from liability, and the company had not done what was reasonably sufficient to give him notice of the conditions on which he was being carried, the company was liable in damages either under the law of Ontario or that of Quebec.

Per ANGLIN, J.—Although no action would lie in Ontario unless the deceased would have had a right of action, had he survived, and such an action would have been barred there by the contract signed by him, nevertheless, in Quebec, where there is no such rule of law, the action would lie, though the wrongful act had been committed in Ontario, as it was of a class actionable in Ontario. *Machado* v. *Fontes*, ((1897), 3 Q. B. 231), applied.

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Section 340 of the "Railway Act," R. S. C. 1906, ch. 37, provides that "no contract, condition, . . . or notice made or given by the company impairing, restricting or limiting its liability in respect of the carriage of any traffic shall . . . relieve the company from such liability unless such class of contract . . . shall have been first authorized or approved by order or regulation of the Board. (2) The Board may, in any case or by order or regulation, determine the extent to which the liability of the company may be so impaired, restricted or limited." The Board made an interim order permitting the use by the company, until otherwise determined, of the shipping form used, but did not expressly authorize the form containing the conditions signed by deceased.

Held, per FITZPATRICK, C.J., and DAVIES and ANGLIN, JJ. (IDINGTON, DUFF and BRODEUR, JJ., contra), that the contract signed by deceased was one of a class authorized by the Board.

Per DUFF, J.—The contract signed by deceased could not have the effect of limiting the liability of the company because it was not in a form authorized or approved by the Board, and there had been no order or regulation made by the Board expressly determining the extent to which the company's liability should be impaired, restricted or limited as provided by sub-sec. 2 of sec. 340 of the "Railway Act."

Judgment appealed from, affirming the judgment of the Superior Court, (Q. R. 46 S. C. 319), affirmed.

Appeal dismissed with costs.

G. G. Stuart, K.C., for appellants.

R. C. Smith, K.C. and *Savard*, for respondents.

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CONTEMPORARY LEGAL REVIEWS AND PERIODICALS.

The Law Quarterly Review for April commences with a more than usually extended series of those "Notes" upon recent decisions which has been from its commencement some thirty years ago one of its most attractive and valuable features. In it we have also the second instalment of Mr. W. S. Holdsworth's *Origins and Early History of Negotiable Instruments* which he commenced in the number for January last. In the January Article he enumerated the characteristic features of negotiability in our modern law as three in number, namely, (1) negotiable instruments are transferable by delivery if made payable to bearer, or by indorsement and delivery if made payable to order; and the transferee to whom they have been thus delivered can sue upon them in his own name; (2) consideration is presumed; (3) a transferee, who takes one of these instruments in good faith and for value, acquires a good title, even though his transferor had a defective title, or no title at all: and the questions he has set himself to answer are (a) what were the germs from which instruments having these qualities were developed; and (b) what were the technical processes by which this development took place? In these two Articles he discusses the early documents, first, apparently, devised by Lombard lawyers of the eighth and ninth centuries in Northern Italy, the use of which spread over Europe in the thirteenth century, whereby debtors were authorized to pay the creditor or his nominee, or the creditor or the producer of the document; and then proceeds to deal very lucidly and convincingly with the origin and development of the Bill of Exchange, finding his starting point in the mediaeval contract of *Cambium,* which he explains was a special variety of the contract of *Permutatio;* for while *Permutatio* was concerned with exchange generally, *Cambium* was concerned with the special case of the exchange of money for money. In the Article in the present number Mr. Holdsworth discusses the machinery devised for giving effect to this contract of *Cambium,* namely, the Bill of Exchange, the idea of which he inclines to think originated in the customs of Italian cities; and the legal development of which undoubtedly took place under the influence of Italian commercial lawyers. The origin is to be sought in the Italian

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letter of payment which at first was merely a contract by which A. contracted with B. to transport money for B. to another place, in order that that money might be paid over to C. As to the development of the negotiable character of the bill of exchange, there is evidence that the Italian merchants were attempting to make bills of exchange completely assignable by repeated indorsements as early as 1560. "The legal position," says Mr. Holdsworth, "of the various indorsees *inter se* is really dictated by this legal reasoning which made several indorsements possible. The principal must indemnify his agent for all expenses to which the agent has been put. If, therefore, X. a payee, in consideration of a sum of money, makes Y. his procurator *in rem suam* by indorsing and delivering to him a bill, and Y. cannot get paid by the acceptor, X. must indemnify him; and clearly if Y. indorses to Z. the same principle will apply as between Y. and Z."

Another Article in the April *Law Quarterly* discusses *Covenants in restraint of trade in relation to personal services* in connection with the case of *Goldsoll* v. *Goldman*,[1] which we noticed in our February number (p. 168), and the remarks of Neville, J., therein. The writer, Mr. A. E. Randall, observes that:

> "Covenants in restraint of trade do not all stand upon the same footing, nor are they affected by the same considerations. They may arise in one of three ways, First, where a person sells or transfers a business or an interest in a business, and covenants not to compete with the purchaser. Whatever views may have been expressed regarding these, it has at last been realized that it is as much in the interest of the seller as of the buyer that effect should be given to provisions which shall secure to the purchaser the full benefit of that which he has purchased, and by reason of which an enhanced price has been obtained by the seller. A second class of case is where a person is precluded by contract from using premises in a particular way. It has never been suggested that these covenants are within the supposed mischief of contracts in restraint of trade. As a general rule they are framed as part of a building scheme, and the covenantor, and those who claim under him, usually receive the benefit of a compensating covenant which gives

[1] 84 L. J. Ch. 63, [1914] 2 Ch. 603.

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them a local monopoly. The third class is the one to which the general observations of Neville, J., are more directly applicable, namely, where a person has covenanted that he will not during the period of his apprenticeship or employment or after it has ceased, engage in breach of his present engagement or in competition with his former teacher or employer, and in the latter event either on his own account or as servant of another."

After discussing the cases, Mr. Randall says:—

"If the cases relating to contracts in restraint of trade are read attentively, it will be found that they range themselves under the various heads to which I have drawn attention, but the distinct considerations which their intrinsic differences demand have not always been attended to, and the irrelevance of dicta have not been appreciated. It is unnecessary to introduce further anomalies into our law for the purpose of attaining true justice. A man is not bound to teach, and the result of the application of what some may regard as a wise rule of public policy might compel persons to learn their business from the unskilled whom competition could not affect. The public has nothing to gain by being served by a host of imperfectly trained individuals, and that result might follow if the teacher were not held to be entitled to restrict competition. We need go no further than the City of London to obtain an illustration of self-protection by refusing to take more than a very limited number of apprentices, and the rules of trade unions have long been governed by this policy."

In connection with the subject of this Article we may call attention to the recent case of *Herbert Morris Ltd.* v. *Saxelby*,[2] noticed in our April number, *supra* p. 334.

We must not omit to specially mention another Article in the *Law Quarterly Review* for April, namely, that by Mr. A. V. Dicey on *The Development of Administrative Law in England*. It has special reference to the recent decision of the House of Lords in *Local Government Board* v. *Arlidge*,[3] the effect of which was to hold that the transference by statute of jurisdiction from a Court to the Local Government Board is in itself *prima facie* evidence that Parliament intended that such jurisdiction should be exercised in accordance, not with the rules which govern judicial procedure,

[2] 84 L. J. Ch. 149.
[3] 84 L. J. K. B. 72, [1915] A. C. 120.

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but with rules which govern the fair transaction of business by the Local Government Board. The learned writer points out that this decision—

> "May have far reaching consequences. It may lead to the result that any government department which is authorized by statute to exercise judicial or quasi judicial authority, may, or rather must, exercise it in accordance, not with the procedure of the law Courts, but with the rules which are found to be fair and convenient in the transaction of the business with which the department is officially concerned."

He concludes with the observation that—

> "Modern legislation and that dominant legislative opinion which in reality controls the action of Parliament, has undoubtedly conferred upon the Cabinet, or upon servants of the Crown who may be influenced or guided by the Cabinet, a considerable amount of judicial or quasi-judicial authority. This is a considerable step towards introduction among us of something like the *droit administratif* of France, but the fact that the ordinary law Courts can deal with any actual and provable breach of the law committed by any servant of the Crown still preserves that rule of law which is fatal to the existence of true *droit administratif*."

Other Articles in the Number are *Alien Enemy Litigants* by Arnold D. McNair; *Companies with Enemy Shareholders* by James Edward Hogg; *More Wardour Street Roman Law* by W. W. Buckland; and *Hurst* v. *Picture Theatres, Ltd.*,[4] (in which the Court of Appeal in England decided that if A. has paid for a seat at a theatre and has been allowed to enter, the license to enter and remain during the performance cannot be revoked, provided A. behave properly and complies with the regulations of the management) by J. C. Miles, who observes that if this means that—"if A. is under B.'s license on B.'s property, and such license has been given for value, B. cannot revoke the license and treat A. as a trespasser, one could wish that so important a doctrine has been laid down a little more clearly." The number concludes with an appreciation of the late Mr. Justice Kennedy, who "will be remembered among those who knew him as an accomplished

[4] 83 L. J. K. B. 1837, [1915] 1 K. B. 1.

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scholar, a broad-minded judge, an erudite jurist, and a most charming and loyal friend."

The Michigan Law Review for May opens with the first long instalment of a profound Article upon '*The nature and importance of legal possession*' by Mr. Joseph W. Bingham. We cannot pretend that even a careful reading has enabled us to clearly understand the writer's point of view. Perhaps a further instalment will do so. Most of us probably are content to understand 'legal possession' as meaning possession under such a state of circumstances that even, though the possessor be not the owner, the law will protect him in his possession by certain special remedies, called for that reason, 'possessory remedies,' and after the lapse of a certain length of time will convert that legal possession, if uninterrupted, into ownership, or the practical equivalent thereof. And we discover that the conception of possession, not only in a legal, but also in a popular sense, is a complex one, involving, on the one hand, a measure of physical control, and, on the other, a measure of mental intention to possess. These we call the *corpus* and *animus* of possession. And finally we say that to discover the precise conception of legal possession which any given system of law embraces, we must find out just what measure of physical control, and what degree of accompanying mental intention to possess, that system of law desiderates before it will recognize the possessor as entitled to the possessory remedies, even though he be not the owner. If we find in a given system of law anomalous cases which do not tally with the general conclusion at which we thus arrive, we rank them as exceptions "due to some particular juridical policy or consideration, to historical accident, to the unsystematic courses of juristic development, or to judicial error." All this is unsatisfactory to Mr. Bingham. He says: "The fault lies in the method of attacking the problem and, back of that, in a very common fundamental fallacy which treats abstract ideas, generalizations, and the language in which they are expressed, as the essential enduring substance of the law instead of only transitory, subordinate implements of technical thought and communication. What is a proper method?" We confess we have not at present been able to grasp what in the view of the learned writer the answer to this question should be. We hope the next instalment will make the matter more clear to us. The

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remaining Articles in this number of the *Michigan Law Review* are on *Classes of American Religious Corporations*, and *Some Sociological Aspects of Criminal Law.*

The Yale Law Journal for May is much devoted to the subject of the regulation of Commerce. It contains one lucidly written Article by Mr. Bruce Wyman on *The Rise of the Interstate Commerce Commission* of the United States in which he traces the steps by which its jurisdiction has developed. He ends by the following prediction:—

> "As I view the evolution disclosed by this narrative, it seems to me that it is clearly indicated that in its next stage the Interstate Commerce Commission will be empowered, to give relief in particular cases of bad service brought to its attention as it has been granted over improper rates. All over the country the State Commissions are being given the same measure of power over service which they have over rates. . . . The Interstate Commerce Commission has never been given greater power over rates than to reduce particular rates, and then only if the existing rates are in fact clearly found to be unreasonable; and it would not, therefore, be given wider jurisdiction over service than to remedy particular defects plainly shown in proper proceedings."

Later on there is an Article by Mr. Lindsay Rogers on the *Power of the States over Commodities excluded by Congress from Interstate Commerce.* It appears that the Supreme Court of Montana, in a recent case, has held that when Congress has prohibited certain subjects of interstate commerce, in the particular instance, the transportation in interstate commerce of women for immoral purposes,—the States are powerless to interfere with these same subjects; and it would seem to be immaterial that the federal and State laws might act concurrently. And so in the case cited the Court held that a State statute forbidding the entrance into the State of women for immoral purposes, and making criminal the aiding and inducing of such entrance is unconstitutional. Mr. Rogers disputes the correctness of this decision, and holds that the exclusiveness of federal authority in respect to commodities which have been prohibited from interstate commerce is not justified; and that there is no reason why the transportation in interstate commerce, and the introduction

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into the State may not be two distinct crimes against two governments.

Other Articles in this Number of *The Yale Law Journal* are *Acquirement of Real Property by American Churches* by Carl Zollman, and *Tinkering with the Constitution* by Jos. R. Long. It appears from this last Article that a Society has recently been formed, with headquarters in Brooklyn, having for its object to secure an amendment to the Federal Constitution, by providing easier modes of amendment of that Constitution than those prescribed by Article V. The conditions precedent to an amendment under that Clause are so stringent that we have the authority of President Wilson himself, in his *Congressional Government,* that—'no impulse short of the impulse of self-preservation, no force less than the force of revolution, can nowadays be expected to move the cumbrous machinery of formal amendment of the Constitution of the United States. That must be a tremendous movement which can sway two-thirds of each House of Congress, and the people of three-fourths of the States.' Nevertheless Mr. Long does not sympathise with the objects of the Society above referred to. He reviews the history of proposed amendments to the Constitution and cites the Sixteenth Amendment of July, 1909, authorising the imposition of an income tax, which "was adopted within about three and one-half years after it was proposed by Congress" as proving that "the Constitution could be peaceably amended if the people really so desired." Then he cites the Sixteenth Amendment of May 31st, 1913, providing for the election of the Senators by the people, which was ratified in four days less than one year from the day on which it was proposed: "so that in less than four years two independent and unrelated amendments were added to the Constitution." After discussing certain amendments which have been proposed, but not carried into effect, Mr. Long concludes his interesting Article thus:—

> 'The Constitution is not perfect. The result of compromise in the first instance, it is not the embodiment of a philosophic scheme of government but a working instrument of practical statesmanship. In the hands of the Supreme Court it has been admirably fitted to the needs of successive generations of our people. When necessary, or when the people really desire it, it can be amended. The present mode of amendment assures its

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stability while permitting natural evolution; a simpler mode might work its destruction.'

We have very gratefully to acknowledge our monthly bundles of legal publications from British India—*The Madras Law Times, The Madras Weekly Notes, The Calcutta Weekly Notes, The Madras Law Journal, The Madras Criminal Law Review,* and the *Punjab Law Reporter.* We notice that the *Calcutta Weekly Notes* for April 5th, 1915, notices at considerable length our Mr. Justice Riddell's recent Address on *the Administration of Justice* delivered before the *Illinois State Bar Association* at Chicago, opening it with the remark that—'this vigorous plain speaking is so obviously instinct with high purpose and sound judgment that it ought not to be missed in any place where a similar system of Judicial administration prevails.' It especially singles out the following remarks of the learned judge, the force of which, it says,—'coming from a judge of over thirty years' experience'—Is it so long!—'can hardly be over-rated':—

> "Whenever, by any hide-bound practice, a Court cannot do justice on the facts because a lawyer has made a mistake, there is a failure in the elementary duty of the Court. In an ideal State every liberty will be given to both parties to bring out the relevant facts, and judgment will be given on those facts according to the very right and justice of the case, even if the lawyers make fifty mistakes and a hundred omissions."

Of course the cases reported in these publications seldom have much application to our law. They are interesting none the less. We note one in the *Madras Law Times* of March 9th, which tells us that—'It is settled law that in families governed by Aliyasantana law the senior female if she be the senior member of the family, is entitled to manage the family properties. The management by any other member is only by sufferance. Special family custom in derogation of that rule must be strictly proved.'

The Madras Law Times has a laudable love of humour. It culls from various sources legal stories which have the peculiarity of being really amusing. The number for March 2nd has some admirable Westbury stories, amongst others Lord Westbury's remark when Bovill was made Chief Justice:—"I think that with a very little more experience Bovill

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will probably make the worst judge in England." But better still is the story of how Lord Westbury, meeting Lord St. Leonards one day, said to him:

"My dear St. Leonards, why don't you come down and give us your valuable assistance in the House of Lords?"

"Ah," said Lord St. Leonards, "I should be of no use. I am old and blind and stupid."

"My dear St. Leonards," said Westbury, "that does not signify in the least. I am old, Chelmsford is blind, and Colonsay is stupid; yet we make the very best court of appeal which has ever sat in that assembly."

A. H. F. L.

The Law Magazine and Review for May contains a racy article by Arthur Cleveland on *Defamation in the Local and Ecclesiastical Courts.* Down to the close of the 14th Century, whatever may have been the reason, the King's Courts would have nothing to do with actions of defamation, and the ecclesiastical authorities who were never behindhand in extending jurisdiction entertained these actions. Their jurisdiction however was not exclusive; for the Customary and Leet Courts throughout the 11th, 12th, and 13th Centuries disposed of many such cases; even claims for defamation imputing a sin, which later on were held to be cognizable by Courts Christian only, and damages were awarded. Thus the Ruthin Court Roll contains the following: "It is found by inquest that Rohese Bindibere (3d.) called Ralph Bolay thief, and he (3d.) called her whore. Therefore both in mercy. And for that the trespass done to the said Ralph exceeds the trespass done to the said Rohese, the said Ralph do recover from the said Rohese 12d. for taxed damages." Seeing that in these local Courts the plaintiff could obtain damages, but in the Courts Christian could only obtain the satisfaction of putting the defendant to the penance it appears surprising that the Ecclesiastical Court was resorted to. There were several reasons for this; and there was always the satisfaction such as it was, of seeing your enemy dressed in a white sheet in the midst of the congregation, and after a sermon and the third chapter of Saint James' Epistle, hearing him recite a long and abject apology in which he called himself more unpleasant names than he had called you, "promysinge before

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God and you here present that I fully intend to amende my outeragious tonge and wilfull behaviour; for the obbeyninge and performing thereof I humbly beseache you all to pray unto God as our Saviour taught us, sainge "Our Father, which art in heaven . . ." Theoretically the Ecclesiastical Courts had no jurisdiction except where the defamation imputed a sin; punishable by the Courts Christian; for after the King's Courts began at the commencement of the 15th Century, to take cognizance of libels and slanders prohibition might issue to prevent Ecclesiastical Courts dealing with cases of defamation outside this class. But probably till the close of the 16th century the Ecclesiastical Courts did pretty much as they chose, trying cases irrespective of whether they were properly cognizable or not. Then Dorothy Robinson is cited for saying Agnes Parker "came more likely to steill a pig than to see them;" Janet Armstrong for saying John Hall had "murdered and put down his two wyfes;" John Wright for saying "Lawrence Douglas was a Scot;" Elinor Anderson for saying Leonard Taylor was "a gouse and a hen thief and all his;" and Stephen Nicholson for saying Edward Younger "did eat fyve stolen geis all upon one day in his house and kept his door spaired all tyme they were eating." After the 16th Century the jurisdiction of the Ecclesiastical Courts was limited more strictly by the King's Courts; yet it was not until 1855 that the jurisdiction of the Ecclesiastical Courts over defamation was finally abolished by Statute.

Mr. R. R. Formoy writes on *Householders Liability for Damage caused by Falling Tiles.* There is some uncertainty as to the law, arising from the decision in the case of *Tarry* v. *Ashton.*[17a] It will be remembered that in that case a heavy lamp fell and injured a passerby. The occupier of the house knew of a defect in the bracket and had employed a contractor to repair it, who however failed to effect a proper repair to the flaw in the iron. There was a unanimous judgment, by Blackburn, Lush and Quain, JJ., for the plaintiff. But the reasons of the three judges were different: Blackburn, J., appeared to rest his decision either on the ground of negligence or of nuisance; while the other two judges used language which might imply that they regarded the occupier of the house as being under an absolute duty to see that no injury befell a passerby. In a more recent Irish

[17a] (1876) 1 Q. B. D. 314.

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case of *Palmer* v. *Bateman*,[18] a piece of gutter fell from the roof owing to the rusting of a screw. The occupier knew of no defect, and there was evidence of due diligence on his part. A Court of first instance, a Divisional Court, and the Irish Court of Appeal all found in favor of the defendant. It is clear that if there is negligence on the part of the occupier he is liable; and if an accident has happened the plaintiff will succeed unless the defendant can prove due diligence. Supposing, however, that the defendant can prove due diligence does that put an end to the matter? First, as regards nuisance Mr. Formoy seems to think that this will depend on the circumstances of each particular case. Secondly, as regards absolute responsibility the Irish case appears to conflict with what was said by Lush and Quain, JJ. The question may be put in this way, whether or not the principle of *Rylands* v. *Fletcher* does or does not extend to the escape of solid bodies. Mr. Formoy seems to think that the English Court will adopt the same rule as the Irish Court, should the case come before them.

The rest of the Magazine is concerned mainly with articles relating to the war. Mr. Percy H. Windfield writes on *Air Craft Attacks*. Mr. W. E. Wilkinson on *Reprisals in Warfare*, and there are also *Current Notes on International Law*. Mr. J. S. Henderson contributes a paper on the old Scottish *Law of Deathbed*, and there is a *Review of Judicial Statistics for England and Wales in 1913*.

In Harvard Law Review for May Samuel Williston writes on *Does a Pardon Blot out Guilt?* He attacks the statement in the leading U. S. case *Ex parte Garland*,[19] that a pardon "releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence." This statement is not without some warrant from English precedents. Bracton says that a pardoned man is "like a new-born infant and a man as it were lately born," and the case of *Cuddington* v. *Wilkins*;[20] decided that after a pardon the law could not see the convict's guilt. The learned writer is not satisfied with this rule; and makes a distinction: Pardon removes all legal punishment, but if *character* is a necessary

[18] (1908) 2 Ir. R. 393.
[19] (1866) 4 Wall. 333, 380.
[20] (1615) Hob. 67, 81; S. C. Browne & G. 10.

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qualification for office a pardon of a convicted criminal will not make him eligible. In several cases in the States the question has arisen of disbarring lawyers who have been convicted of crime but pardoned. In general it has been held, in spite of the rule in *Ex parte Garland,* though not without some difficulty that the pardon was no defence to disbarment proceedings. An English decision, *Hay* v. *Justices,*[21] seems the other way. It was there held that a pardoned convict was entitled to engage in the business of selling liquor at retail though the Act provided "Every person convicted of felony shall be forever disqualified from selling spirits by retail."

Remoteness of General Powers, Mr. J. L. Thorndike's paper is a discussion of the statement appearing in Farwell on Powers, 1st ed., pp. 227, 257; 2nd. pp. 292, 322. "A power of appointment among children is well executed by an appointment to one of them for life, with power to dispose of the capital by deed or will, whether such children were *in esse* at the creation of the power or not; for this in effect gives the whole beneficial interest to the appointee, and does not transgress any rule against perpetuity." The authority cited is *Bray* v. *Bell,*[22] S. C. *sub nom. Bray* v. *Hammersley.*[23] Mr. Thorndike analyses this decision of the House of Lords, but finds no support for the statement. The case moreover of *London & South Western Ry. Co.* v. *Gomm,*[24] is found to be a direct authority that such a power would not be valid. The paper concludes with a reference to *Phipson* v. *Turner,*[25] *Gomm's Case,*[26] *Wallaston* v. *King,*[27] *Morgan* v. *Granow,*[28] and then follows a criticism of some points in the Ontario case *Re Phillips,*[29] decided by Middleton, J. Mr. Thorndike's observations on this case will be found under notes on Canadian cases at p. 527 of this issue.

There seems to be no authoritative English case on the question whether the Statute of Limitations runs during war to bar an alien enemy. Mr. C. N. Gregory discusses the American cases in *The Effect of War on the Operation of*

[21] (1890) L. R. 24 Q. B. D. 561.
[22] (1834) 8 Bli. 568; 2 Cl. & F. 453.
[23] (1830) 3 Sim. 513. 518.
[24] (1882) 20 Ch. D. 562, 580-2, 586.
[25] (1874) L. R. 10 Ch. 35, 40.
[26] (1882) 20 Ch. D. 562.
[27] (1869) L. R. 8 Eq. 165, 169-170.
[28] (1873) L. R. 16 Eq. 1, 9-10.
[29] (1913) 28 D. L. R. 94.

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Statutes of Limitation. It is clear that though the Courts be closed by reason of civil war, yet the statute runs. *Beckford* v. *Wade.*[30] And it has been said that the same reasoning applies to the case of an alien enemy. There is a *dictum* to this effect in *DeWahl* v. *Browne.*[31] But see Pollock, *Contracts,* p. 86 n, and *Westlake International Law,* p. 49. The American rule, and justice seems to be with it, though the statute is general in its terms, is that the period does not run. The cases are ———— v. *Lewis,*[32] *Wall* v. *Robson,*[33] *Hanger* v. *Abbott,*[34] *The Protector,*[35] *Semmes* v. *Hartford Insurance Co.,*[36] *Brown* v. *Hiatts,*[37] and three or four others.

The May number of the Columbia Law Review contains an article by W. C. Dennis on *Recent United States Supreme Court Cases Relating to the Situs of Intangible Personal Property for Purposes of Taxation.* Regarding tangible personal property the rule of law appears to be clear that the property must be taxed to its owner where it is actually found and not elsewhere. The Rule as regards intangible personal property is not so clear. The writer summarizes half a dozen cases, all of them decided since 1899, and finds that they clearly establish an exception to the general rule that intangible personal property has its *situs* for taxation at the domicile of the owner. These cases hold that the owner of such property may so deal with it as to give it a *situs* for taxation in a State other than that of his domicile. In summarizing generally the effect of the cases considered in the article with respect of the *situs* of Intangible Personal Property the writer submits:—

1. That these cases show that fundamentally the situation with respect of tangible and intangible personal property is the same; namely, such property is taxable at its actual *situs* (although intangible personal property has of course no physical location).

2. For historical and practical reasons the general rule is that intangible personal property has its *situs* for taxation

[30] (1810) 5 Ves. Jr. 87.
[31] (1856) 25 L. J. N. S. Ex. 343.
[32] 1 Brunner Col. Cas. 27: 15 Fed. Cas. No. 8. 315 (1805).
[33] 2 N. & McC. (S.C.) 498 (1820).
[34] 16 Wall (U.S.) 532 (1867).
[35] 12 Wall. (U.S.) 700 (1871).
[36] 13 Wall. (U.S.) 158 (1871).
[37] 15 Wall. (U.S.) 177 (1872).

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in the State in which the owner (i.e., in case of credits, the creditor) is domiciled.

3. In certain exceptional cases it has been held that the owner may so deal with his intangible personal property as to localize it for taxation in another jurisdiction than that of his domicile. In the decided cases such taxation has only been upheld where a creditor was doing business or engaged in the investment of capital as a business in the State where the debtor was domiciled.

4. If the exceptional circumstances exist, in which intangible personal property is held to have acquired a *situs* for taxation in another jurisdiction than that of the owner's domicile, then it must necessarily follow that it loses its original *situs* at the domicile of the owner, and is taxable at its new *situs* only, and not elsewhere.

Edwin C. Goddard writes on the *Liability of the Common Carrier as determined by Recent Decisions of the United States Supreme Court.* As we have before noticed in the CANADIAN LAW TIMES the rule of law in the United States is now different from that in England. Down to the present day the United States Courts have not admitted that there may be any relaxation of the strict liability of the carrier except by the shipper's consent. The result is that in the United States the common carrier is the insurer of the goods he carries, except for losses due to the act of God, the public enemy, public authority, the act of the shipper, or the inherent vice of the thing shipped. The leading case of *Hollister* v. *Nowlen,*[88] has become authority in every State of the Union for the doctrine that the carrier cannot by notice, even though it be brought home to the shipper, limit his common law liability. In spite of this all the great carrying corporations as a matter of fact have ceased to be liable according to the strict rule of common law. The writer discusses how the special contracts and statutes which have worked this apparent paradox have been interpreted and enforced by the Courts. The article is to be concluded in the next number of the Columbia Law Review.

Mr. Henry Taft discusses *State Control of Navigable Waters.* His article is mainly concerned with the case of the

[88] (1838) 19 Wend. 234.

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Long Sault Company v. *Kennedy*,[89] a case which has caused considerable adverse criticism and has now been taken on Writ of error to the Supreme Court of the United States. It will be remembered that the New York Court of Appeals decided against the validity of the statute giving power to the company to build a dam across a portion of the St. Lawrence River. One of the main reasons given was as follows:—

"No matter how much the interests of the public may demand the improvement thereof in the future the State will be powerless to act either directly or by constraint on the corporation. Here the grant is objectionable on account of the abdication of the State's control over waters which are still to be preserved as navigable, but which are to be turned over wholly to the dominion of a private corporation."

With all respect we doubt whether the decision will be upheld on this ground by the Supreme Court of the United States. Certainly no statute can be declared invalid in our jurisdiction for such a reason.

Among, the notes is one on *Interest in Actions for Unliquidated Damages.*

The weekly articles of *Law Times* for April 24th, May 1st, and May 8th, are respectively, *Restraint on Anticipation, Annuities and their Anomalies,* and *Railway Companies and their customers.*

The May number of University of Pennsylvania Law Review contains an article on *Judicial Administration* by Mr. E. R. Thayer, an address delivered by him before the Law Association of Philadelphia. The "distorted form of jury trial" and other defects are attacked. Howard A. Lehman contributes *A Critical Survey of Certain Phases of Trial Procedure in Criminal Cases;* James B. Lichbenberger writes on *The Uniform Partnership Act;* Herbert A. Howell discusses the question *Are Titles of Books Copyright?;* and Shippen Lewis gives a paper on *Eliminating Archaic Features of Execution Process in Pennsylvania.*

[89] (1914) 212 N. Y. 1.

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The Canada Law Journal for this month contains a further instalment of Mr. Fraser Raney's careful paper on *Marriage and Divorce in Canada.* Parts IV. and V. dealing with Divorce Tribunals, Foreign Marriages, Dissolution of Marriage and Rights and Obligations of Parents and Children, are given. The Journal also contains the usual excellent review of current English cases.

The Illinois Law Review opens its 10th Anniversary Volume with a brilliant little paper by Mr. Justice Oliver Wendell Holmes on *Ideals and Doubts,* in which he gives more than the usual epigram: in fact he rather lavishly supplies three or four. The Article is an address to young lawyers and legislators, calling them to consider in an atmosphere cleared of convention and clap-trap first what condition or result is desirable, secondly, what are the appropriate means. To have doubted one's own first principles he says is the mark of a civilized man. To rest on a formula is a slumber that, prolonged, means death. He exhorts to action: the mode in which the inevitable comes to pass is through effort. The trouble is that our ideals for the most part are inarticulate, and that even if we have made them definite we have very little experimental knowledge of the way to bring them about. He confesses to skepticism but says "I hold to a few articles of a creed I do not expect to see popular in my day. I believe that the wholesale social regeneration which so many now seem to expect, if it can be helped by conscious, co-ordinate human effort, cannot be affected appreciably by tinkering with the institution of property, but only by taking in hand life and trying to build a race. That would be my starting point for an ideal for the law. The notion that with socialized property we should have women free and a piano for everybody seems to me an empty humbug."

Other articles are *The Destruction of Neutral Prizes and the German Prize Code* by C. H. Huberich; *Full Faith and Credit vs. Comity and Local Rules of Jurisdiction and Decision,* by Henry Schofield; and *The Federal Trade Commission* by Michael Gallagher.

We also notice some curious statements taken from letters to the Illinois Law Review submitted on behalf of candidates

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for election to the Supreme Court of Illinois. Whether it is due to severe competition or not the letters all set forth a list of virtues which would be the despair of an aspiring Rhodes scholar. Thus one letter concludes "He is a strong man physically, 58 years of age, of exemplary habits, and a member of the Christian church, and a man respected by all for his ability and integrity. He has never been in any kind of business. He has been a lawyer all his life, without any sidelines. . . ." Another in a crescendo of praise strikes this concluding note, "Mr. Bundy is in splendid physical condition and has a capacity for hard labor. He is 56 years of age and is at the high tide of his mental powers. He is without judicial experience, but has a judicial temperament."

L. D.

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The following letter, signed in the well-known and esteemed initials "W. R. R.," appeared in the Toronto "Globe" lately; and is worth placing on record for the information it gives as to the early history of the legal profession in Ontario.

THE BARRISTER IN EARLY TIMES.

To the Editor of The Globe: In Prof. Grant's valuable "Ontario High School History of Canada," at p. 194, speaking of society in Toronto, especially at the time of Sir Peregrine Maitland (say the second and third decades of the nineteenth century), the learned author says: "A barrister would not shake hands with a solicitor."

The statement is accepted at its face value by the reviewers, who publish the "Review of Historical Publications Relating to Canada." In vol. 19, at p. 8, it is said: "It is amusing to read that in the early rough days of Upper Canada social distinctions were very sharp, 'a barrister would not shake hands with a solicitor.'"

I have been puzzling myself over this statement and can find no authority for it, unless, indeed, it is a joke, just as though the author had said "a barrister would not shake hands with a Queen's professor," because he could not find one to shake hands with.

Of course a member of the lower branch of the profession who practised in a Court of Equity was called a solicitor, but one who practised in a Court of law was called an attorney. There was no Court of Equity in Upper Canada before 1837 (although Chief Justice Powell once tried to get the Governor to act as Chancellor of the Province), and consequently no solicitors at that time. It is true that the Law Society Act of 1797, 37 George III., ch. 13, provided for an articled clerk becoming qualified to act "merely as an attorney or solicitor in any of His Majesty's Courts of law or equity in this Province," but it is equally true that no court of equity was erected till forty years after.

There was indeed from and after 1797 an officer called the "Solicitor-General," but he was no more a solicitor than the present Surveyor-General at Ottawa is a surveyor. Before their abolition in 1794 by the Act 34 George III., ch. 2, the Courts of Common Pleas in the Province had a species

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of equitable jurisdiction, and the practitioners in these courts might not improperly be called solicitors, but they were also advocates, and in any case these courts were abolished long before "the later Lieutenant-Governors, especially Sir Peregrine Maitland."

The error, however, goes much deeper—the assertion is in substance that there were two branches of the profession composed of different individuals (as in England), and that the members of the "higher branch" would not have anything to do with those of the lower. This is wholly baseless, so far as I know.

From the beginning of the Province until 1794, 34 George III., ch. 4, all practitioners were admitted under the former system, i.e., under the ordinance of 1785, which did not distinguish barristers and attorneys; from the passing of the act of 1794 until the Law Society's Act in 1797, those admitted were admitted as "advocates and attorneys;" after the Law Society's Act the practitioner was "called" as barrister and "admitted" as attorney. But every practitioner must have been on the roll of the Law Society and under articles as well. This continued till 1822, when the Act, 2 George IV., ch. 5, removed the necessity of articled clerks, i.e., those desiring to become attorneys, being on the roll of the Law Society.

During this period about six per cent. only of those who became attorneys did not become barristers and about the same number became barristers who did not become attorneys.

After the Act of 1822 only one person became an attorney who did not become a barrister until 1832; after that time the proportion became greater, ultimately leading to the Act of 1857, 20 Victoria, ch. 636, which brought the attorney and solicitor back under the jurisdiction of the Law Society.

At the present time about four per cent. of the practitioners of law are barristers only and about 2½ per cent. solicitors only, The English system wherein the barrister is retained by the solicitor and it is thought not quite seemly for a barrister to court solicitors, never had a footing in Upper Canada.

A few errors in dates will, of course, be corrected in a future edition. The Slavery Act was not passed in 1792, but in 1793, the capital was not moved from Newark to York (Toronto) in 1794.

W. R. R.

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NEW BOOKS AND NEW EDITIONS.

Notes on the Remedies of Vendors and Purchasers of Real Estate, with special referenc to instalment plan agreements, rescission, determination, relief against forfeiture. 2nd edition. By C. C. McCaul, B.A., K.C., of Osgoode Hall, and of the Bars of Alberta. Saskatchewan, and British Columbia. Toronto: The Carswell Company, Limited, 1915; London: Sweet and Maxwell, Limited.

We have already noticed in our number for last April the appearance of a 2nd edition of the above book. After a careful study of its contents we are now able to speak with confidence of its merits. It is, in fact, deserving of the highest commendation for diligence and acumen in discussion of the cases, and for lucidity and style. It is in truth a new departure among Canadian text-books, and bears throughout the touch of a master-hand. It is in every respect worthy of the professional reputation of the learned author. The above heading, which is taken from the title page, admirably indicates the scope and contents of the book. To challenge adequately any of Mr. McCaul's conclusions would require one to be a past-master of the law on the subjects with which he deals, and would involve a treatise almost as long as the book itself. Evidently the prominence which dealings in the purchase and sale of land occupy in the life of our western provinces, has lead to a very special development of the law of vendor and purchaser; and Mr. McCaul's exhaustive treatment of the local decisions will render his book specially valuable to practitioners in those Courts where he has made his own high reputation. One special feature of the book is the manner in which the writer insists upon and works out the distinction between *rescission* and *determination* of a contract of sale of land, and the consequent rights, and liabilities of the parties. Another is the masterly way in which he discusses the bearing of a clause expressly making time of the essence of the contract, arriving at this conclusion (p. 114):—

'It is suggested that the effect of a stipulation making time of the essence of the contract, so far at least as it affects the power of the Court to relieve against forfeiture, cannot be expressed more strongly than that such express stipulation will be noticed by the Court among other circumstances (including the subject-matter of the contract) in considering the equity to relief against forfeiture. It would seem, too, to be, perhaps deducible from the authorities, that the Court

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will not in any event strictly enforce the stipulation as to time, except in cases where it is also possible to enforce *restitutio in integrum* without injustice to either party."

Mr. McCaul also discusses and gives prominence (p. 19) in a way we have not seen done elsewhere, to the effect on this whole subject of the express statutory provisions in respect to the power of the Courts to relieve against all penalties, and forfeitures, which are found in Ontario, Manitoba, Alberta, and British Columbia. In connection with this matter we may call the attention of the learned author to the fact that since the Privy Council decision of *Kilmer* v. *British Columbia Orchard Lands, Ltd.*,[1] the Ontario Courts have not followed the decision in *Labelle* v. *O'Connor*.[2] See *Boyd* v. *Richards*.[3] At p. 516 of this number we refer to a recent decision of the House of Lords, later than the publication of Mr. McCaul's book, which seems to uphold the binding efficacy of an express agreement that time shall be of the essence. But this of course would not affect the force of *Kilmer* v. *British Columbia Orchard Lands, Ltd.*, in Canadian Courts. We are much impressed by the suggestion of Mr. McCaul that the condition of Western Canada in respect to land-holding and the way in which land is regarded, may render the English cases as to when specific performance should be granted not really applicable (pp. 44-45); as also by his suggestion (pp. 154-5) supported by a Saskatchewan case, but which 'has not met with approval in Alberta,' that the *ratio decidendi* of *Bain* v. *Fothergill*[4] as to damages recoverable from a vendor who is unable to complete owing to defect in title, ceases to apply in countries possessing the Torrens system of Land Titles.

On the point of the right of action for each instalment as soon as it becomes payable under the contract, where the purchase-money is payable by instalments, Mr. McCaul has omitted to notice *Vivian and Co.* v. *Clergue*,[5]: and although we find the case of *Gibbons* v. *Cozens*,[6] referred to in the Table of Cases, we don't find it at the page mentioned, nor have we found it anywhere else in the book.

[1] [1913] A. C. 319.
[2] 15 O. L. R. 519.
[3] (1913) 29 O. L. R. 119.
[4] L. R. 7 H. L. 158.
[5] 15 O. L. R. 280; 16 O. L. R. 372; 41 S. C. R. 607.
[6] 29 O. R. 356.

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We have received Hanson's Death Duties, 1915, being a supplement to the 6th edition, by J. S. Franey, B.A., of the Inner Temple, Barrister-at-law: London: Stevens and Haynes.

We have also received Volume XXXIX. (1914) of Reports of the American Bar Association, and the *American Bar Association Journal,* and hope to notice the contents in our next number.

THE GAZETTES.

The Canada Gazette for May 1st, 1915, contains the appointment of Mr. Justice Hodgins to be a Commissioner to enquire into and report upon certain charges preferred against His Honour Clarence Russell Fitch, judge of the District Court of the District of Rainy River.

The Canada Gazette for May 1st, 1915, contains an Order in Council of April 27th, 1915, prohibiting the exportation except to the British Dominions, the allied countries (except Russia's Baltic ports), and the United States when for consumption in the United States only, of a long list of Articles, other than munitions of war, but 'capable of being converted into or made useful in increasing the quantity of military or naval stores, provisions, or any sort of victual which may be used as food by man.'

The Canada Gazette Supplement for May 8th, 1915, contains the new By-laws for the Pilotage District of Montreal, confirmed by Order in Council of April 29th, 1915.

The Canada Gazette for May 22nd, 1915, contains the new regulations as to the removal of timber in Dominion Parks confirmed by Order in Council of April 30th, 1915.

The Canada Gazette of May 29th, 1915, contains the Order in Council proroguing Parliament until July 3rd, next.

The Manitoba Gazette of May 1st, ult., contains the proclamation proroguing the Legislature until June 10th, next.

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The Saskatchewan Gazette of April 30th, ult., contains the proclamation convening the Legislative Assembly for May 10th, ult.

The British Columbia Gazette for April 29th, 1915, contains the Dominion Order in Council of March 6th, 1915, giving the first authoritative definition of 'game,' as applicable to the Regulations governing the National Parks of Canada, and prohibiting expressly, for the first time, the possession of 'game' obtained within the Parks. 'Game' is now declared to mean:—'All animals and birds protected by these regulations, and the heads, skins, and every part of such animals and birds.'

LOCALS AND PERSONALS.

Corporal J. G. Thomson, of 79th Cameron Highlanders, before enlistment a law student in the firm of Thomson and Thomson of Winnipeg, is reported wounded.

Mr. Justice Wallace Graham, was on April 27th last appointed Chief Justice of the Supreme Court of Nova Scotia in succession to Sir Charles Townshend, retired.

Mr. H. E. A. Robertson, of Victoria, B.C., has been appointed County Court Judge of the District of Cariboo.

Mr. Alph. Bernier, K.C., M.PP. for Levis, has been elected Batonnier of the Quebec Bar.

The Honourable A. W. Atwater, K.C., has been elected Batonnier of the Montreal Bar.

Mr. W. A. Ewing, K.C., has been elected President of the Law Society of St. John, N.B.

His Honour Alfonso B. Klein, for over twenty years Junior Judge of the County of Bruce, has been made Senior Judge of the County. Mr. A. M. Greig, of Almonte, has been appointed Junior Judge.

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We have to note with regret the following deaths among judges and members of the profession:—

The Honourable Simeon Pagnuelo, judge of the Superior Court of the district of Montreal on May 14th, at Montreal.

His Honour Alexander Finkle, judge of the County of Oxford, on May 27th, at Woodstock.

Mr. E. E. A. Du Vernet, K.C., of Toronto, on May 31st, last, at Toronto.

James Stewart Tupper, K.C., eldest son of the Right Honourable Sir Charles Tupper, on April 29th, at Oxford, England.

John J. Drew, K.C., late of Guelph, on May 8th, in Toronto.

M. E. Charpentier, K.C., the dean of Montreal lawyers, on May 6th, at Montreal.

A. E. H. Creswicke, K.C., on May 7th, at Barrie, Ont.

John Alfred Murphy, late Crown Attorney of Haldimand County, on May 8th, at Cayuga, Ont.

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The Canadian Law Times.

VOL. XXXV. JULY, 1915. No. 7.

BY THE WAY.

We are very glad to be able to publish in this issue a paper by Mr. Z. A. Lash, K.C. The position of Mr. Lash as an authority in that region where finance and law meet is so unique, that we are sure the readers of the CANADIAN LAW TIMES will welcome the contribution he has been kind enough to send to us, although its subject is a purely financial and economic one, namely, the 'Effect of the War upon the rates of sterling and New York exchange.' After some preliminary observations as to what is meant by "exchange," and what "money" is, Mr. Lash explains in a delightfully lucid way, why the war is the chief cause of the great differences between the previous and the present rates of exchange between Canada and London, and how it operates to bring about and maintain so serious a change in these rates.

We call special attention to what we think we are justified in calling a clever and striking Article on the all-important subject of 'Costs,' which we publish in the present number. We are not at liberty to mention the name of the writer. We should think, however, that the Article would cause some searchings of heart among members of the Judiciary, as to what is meant by the words 'discretion of the Court or judge, in what used to be Consolidated rule 1130, but has now received its apotheosis by being turned into sec. 74 of our Judicature Act. Everybody knows the provision referred to. 'Subject to the express provisions of any statute, the costs of, and incidental to, all proceedings shall be in the discretion of the Court or judge, and the Court or judge shall have full powers to determine by whom and to what extent the costs shall be paid.' Surely we may say with confidence that

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it never was the intention that successful parties to legal proceedings should be deprived of their costs as an expression of what our contributor calls 'an ill-defined *censura morum*,' much less of 'vague sentimentalism and vicarious generosity;' but that the discretion to be exercised should be founded upon demonstrated facts directly relevant to the issue between the parties: yet some of the very recent cases cited by our contributor, would almost lead us to suppose that more than one member of the Bench interprets the provision differently.

There is nothing which the administration of justice in Ontario requires more than the formation and expression, as occasion calls for it, of a real professional opinion. The Canadian and provincial Bar Associations no doubt, to some extent, afford an opportunity for the expression of such an opinion, but annual meetings are like angels' visits, few and far between. They may 'resolute till the cows come home,' but practical results are slow to follow. Such a subject as that dealt with in our Article in this number on 'Costs,' is, we think, preeminently the kind of subject upon which such a professional opinion should express itself. We shall be very glad to make the CANADIAN LAW TIMES a medium for the expression of professional opinion upon this or any other proper subject.

There is one thing which a systematic perusal of the legal Reviews and periodicals produced by our cousins across the line soon suggests, and that is how many valuable hints we might derive from their methods. They go about things in a very systematic and business-like way. Take, for example, the matter of substituting uniformity for diversity in the laws of the different provinces in respect to property and civil rights. As everyone knows the British North America Act contains a special provision intended to promote that object; and at the time of Confederation, it was thought that this unification would soon follow. Yet from that day to this nothing has been effected in that direction, excepting that a few statutes, such as that respecting Assignments for the benefit of creditors, have been re-duplicated in several provinces. In 1902 it is true Dr. Benjamin Russell brought the subject up in the Dominion parliament, but his motion came to nothing; and Mr. Robert Borden, as he then was, said that it was idle for Parliament to attempt anything of the kind until the provinces got together, and ascertained

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whether there was any basis upon which they could agree as to what comes within property and civil rights. Now as the *Yale Law Review* for June shews, there has been in existence for the last twenty-five years in the United States a body known as the Conference of Commissioners on Uniform State Laws.

The main work and object of the Conference of Commissioners on Uniform State Laws has been, and is now, to express in legislative form, clarify, simplify, and make uniform, the commercial law of the various States of the Union. They have, during this period, drafted and recommended to the legislatures of the States a Warehouse Receipts Act, a Bills of Lading Act, a transfer of Stock Act, a Sales Act, and latest, but not least, a Partnership Act. These commercial Acts have already been adopted by several of the States; and we are told that with intelligent cooperation from members of the Bar and commercial bodies interested, it would seem to be merely a question of time when all the States will have adopted this legislation. Nor has the Conference confined itself to commercial law. They have also drafted and recommended an Act relating to Wills executed without the State, a Family Desertion Act, a Cold Storage of Food Act, a Workmen's Compensation Act, besides considering and recommending a Child Labour Act prepared by the National Child Labour Association, and the Pure Food Act modelled after the United States Pure Food and Drugs Act. But various local and economic conditions, and the conflict of opposing social forces have so far made it impossible to secure the general adoption of these non-commercial Acts.

The methods adopted by the Conference of Commissioners on Uniform State Laws are as follows. When they decide to draft a law on a commercial subject they authorise their standing Committee on Commercial law to submit a draft; they also now invariably authorise their Committee to employ a draftsman by whom the initial work is done. His responsibility is to the Committee on Commercial law. The Committee, not the draftsman, is responsible to the Conference. The members of the Committee spend much time over a draft before submitting it to the Conference. They also send copies of the proposed draft for criticism to selected lists of persons who are believed to have some special knowledge of the subject of the proposed Act inviting suggestion

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and criticism, besides frequently calling into conference with them those who from their peculiar opportunities may be supposed to have an expert knowledge of the subject. But no matter how carefully the first draft may be prepared, experience has shewn both the Conference and its Committee that the first draft should not be submitted to the Conference for adoption, but merely for criticism and instruction as to the nature of the changes which it is desirable to insert in the second draft. Time also must be given for the wide distribution of the draft and a consideration of the suggestions and criticisms received. As a matter of fact few, if any, of the commercial Acts have been adopted by the Conference in less than three years from the time the first draft has been submitted, while on many of the Acts the Conference has spent considerably longer time.

Mr. Eugene Lafleur, K.C., has effectively revived interest in this subject of bringing the private laws of the different provinces so far as possible into uniformity, by his Address to the Canadian Club at Ottawa on December 7th, 1912, and by the paper he read before the Canadian Bar Association at its recent meeting in Montreal. He is supported by Sir James Aikins in an Address delivered on December 21st, 1914, before the members of the Canadian Credit Men's Trust Association at Winnipeg, in which we are glad to see Sir James calls very special attention to the Conference of Commissioners on Uniform State Laws, and commends the work already accomplished by it, saying that what the United States has done Canada can do. As Sir James points out the unification, or "standardization" of the laws of the provinces affecting financial and commercial transactions is of great importance to Canadian financial institutions, manufacturers, and wholesale merchants, or jobbers, whose businesses are necessarily carried on throughout the Dominion irrespective of provincial limits; and as trade methods and principles are the same everywhere throughout Canada, there seems to be no reason why those conflicting laws which affect not only provincial but interprovincial business should not be brought into harmony and working simplicity. We are glad to see that a resolution was passed unanimously, as a result of his Address, calling on the respective provincial Governments to appoint a commission or commissioners for the purpose of conferring with such representatives from the other provinces in order to obtain the desired result.

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THE EFFECT OF THE WAR UPON THE RATES OF STERLING AND NEW YORK EXCHANGE.

By the law of Canada, the British sovereign or pound is declared to be of the value of $4.86 2-3 in the currency of Canada. If a demand bill of exchange drawn in Canada on London for £100 costs exactly $486.66, or if a demand bill of exchange drawn in London on Canada for $486.66 costs exactly £100, then the rate of exchange between the two places is said to be at par.

The market price for exchange between London and Canada or London and the U.S.A., and vice versa, is governed by the rate for demand sterling exchange obtainable in New York. The rates in London are based upon the quotations for sterling exchange received there from the New York market. In the case of Canada, the New York rate is taken, and the premium or discount ruling on New York funds in Canada is added or deducted, as the case may be. This is because the volume of business in exchange between New York and London is so much greater than the volume in Canada or other places on this continent. The smaller volume is powerless to control the price of the larger, but the larger forms the basis for the price of the smaller. Ex. gr.—If a merchant in Toronto wanted to send £100 to London he could purchase the draft in New York, and the price there, plus the cost to him of sending the funds to New York for the purchase, would be the cost of the draft. If a bank or financial house in Toronto should ask much more than this, the merchant would buy the draft in New York; therefore the price in Canada is in this way controlled by the price in New York.

In tracing out the effect of the war upon rates of sterling exchange, the U.S.A. and Canada will for the above reason be dealt with together. There are various causes which affect these rates. The subject is a very difficult and complicated one, but the war is a cause so outstanding that it is worth while to deal with it specially. The explanation will be found simple and readily understood.

A bill of exchange is the common means of transmitting money from one place or person to another place or person, and, as the question centres around money, let us before

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answering it go back to first principles for a while and enquire what "money" is.

We call gold and silver and copper coins "money." We call Government notes and bank notes "money." We know that a silver or copper coin much heavier and containing much more metal than a gold coin is not nearly so valuable. We know that one Government or bank note, though of the same size and containing the same quantity and weight of paper as another is not so valuable as that other, because the first has printed on it the figure and word "one" and the other bears the figure and word "ten." We know that a gold or silver or copper coin or a Government or bank note has no value in itself. If it cannot be exchanged some time or other for something else which its possessor wants, what good is it to him? Barrels full of gold coins are not in themselves worth as much to the possessor as barrels of potatoes. He can eat potatoes but he cannot eat or make other use of coins, and if he cannot exchange them for something which he wants he might as well not have them at all. Therefore "money" is merely a medium of exchange, and because it passes or "runs" about in a community it is called "currency," which is a word of much wider meaning than "money" and may be conveniently used to include cheques and bills and other similar instruments of credit which, thanks to the banking system, pass or run about in the community and form a medium of exchange for transactions very many times greater in amount than the transactions in which "money" forms the medium.

We are accustomed to hear that Great Britain, France, the United States, Canada, and other countries are on a "gold basis." What does that mean? Let us get back to first principles again. We know that as mankind formed communities, and felt the need of some ready means whereby the labour or services or possessions of one might be exchanged for those of another without the actual barter and delivery or exchange of the possessions themselves, they adopted various things as this ready means, and those things by mutual acquiescence or consent passed or ran through the community and became their money or currency. This money might consist of any convenient articles, such as shells, &c. Small packages of something in common use were sometimes adopted; but, whatever it consisted of, its value as a medium of exchange depended upon the mutual

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acquiescence or consent of the community. As civilization progressed and the right to make laws was conferred upon or usurped by individuals or classes, this mutual acquiescence or consent might be supplanted by a law declaring for the people what should be their money or common medium of exchange. Imagine for a moment (what is practically the impossible) a self-contained community having within their own reach all the necessaries and even luxuries of life, and not having and not needing any intercourse or business with any other community. The law might declare or they might agree upon anything to be their currency or common medium of exchange, and, provided it were suitable for the purpose, there would be no reason for a change. The practical difficulty would be confined to the selection of the suitable article. Imagine then (what is not the impossible) that this community began to need and have intercourse and business with another community. They would either have to go back to the primitive barter and actual delivery or find some currency or common medium of exchange to answer the purpose. This is what has actually happened between civilized trading nations, and gold has been agreed upon as this medium. The reason is that gold, more than any other article yet discovered, possesses the characteristics required. It is a pure metal, and the degree of purity of any sample can be readily ascertained. It does not corrode or deteriorate by use. It is found nearly all over the world to a substantially sufficient total to meet the requirements, but is not found in undue quantities in excess of requirements, which would depreciate rapidly or unduly the value of the stock on hand. It is easily worked into coins, which with but little alloy are hard and durable. It is not of large bulk, and its value, having regard to the degree of purity, is conveniently ascertained by weight. No other article possesses all these characteristics. For these reasons gold has been accepted by all civilized nations as the common medium for which the goods of the people of one nation, bought by the people of another, may be exchanged, and by which the obligations of one nation or its people to another nation or its people can be discharged.

In most countries there are gold coins which form part of the money or currency, but for the convenience of the public and for reasons of finance there are also Government notes and bank notes. These are simple promises to pay to

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the bearer the amounts mentioned in them, and they pass "current" as money. If by the promise or by law they are redeemable in gold, the money currency is on a gold basis. The ability or inability of the Government or bank to pay in gold belongs to another branch of the subject, which need not be discussed here. But currency of the gold coin or Government or bank note kind forms but a small fraction of the general currency of a country, about ninety-five per cent. of which consists of cheques and bills of exchange and other similar instruments of credit. If these items are payable in gold or in Government or bank notes redeemable in gold, then the country is said to be on a gold basis. Here again the ability or inability to pay belongs to another branch of the subject. For the purposes of this discussion the ability will be assumed.

I shall now explain why the war is the chief cause of the great differences between the previous and the present rates of exchange between Canada and London, and how it operates to bring about and maintain so serious a change in these rates.

Bills of exchange are bought and sold as if they were goods, wares and merchandise. If the demand for certain goods be brisk or in excess of the supply, the price naturally goes up. If the supply be in excess of the demand, the price naturally goes down. The same principles apply to the price of bills of exchange. The par price of a demand bill drawn in Canada on London for £100 is $486.66. In July, 1914, and for previous months, the price was practically $489, or $2.33 per £100 *more* than par. For a demand bill for $486.66 drawn in London on Canada in July, 1914, and in previous months the par price would have been £100, but the actual price was on the average about £99 10s. 5d. only, or 9s. 7d. (=$2.30) per £100 *less* than par. Under the law of demand and supply, these figures would indicate that the demand in Canada for bills on London was at that time in excess of the supply, and that the demand in London for bills on Canada was less than the supply.

In June, 1915, and previous months the price of a demand bill for £100 drawn in Canada on London was on the average about $480.25, or $6.41 *less* than par. For a demand bill for $486.66 drawn in London on Canada in June, 1915, and previous months the price was on the average about £101 6s. 8d., or £1 6s. 8d. (=$6.46) *more* than par. Under

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the law of demand and supply these figures would indicate that in June, 1915, the demand in Canada for bills on London was less than the supply, and that the demand in London for bills on Canada was in excess of the supply.

There was a period immediately after August 4th, 1914, when war broke out, when the whole exchange system between this continent and Europe broke down completely as a system. There were but few transactions; the rates were not governed by the ordinary rules of demand and supply; the world was in a panic. This period will be omitted in tracing the effect of the war upon rates of exchange.

What, then, governs the rates between New York and London, and vice versa? The answer is,—the law of demand and supply. Remember that a bill of exchange is simply a means of remitting money from one place or person to another place or person, and remember that "money" or currency is merely a medium by which goods or other property bought may be paid for, and by which obligations incurred may be discharged. Remember also that Great Britain and the U.S.A. and Canada are upon a "gold basis."

When it is said that Great Britain and the U.S. buy from or sell to each other, or that one borrows from the other, the nations as Governments are not meant; what is meant are the individuals composing the nation, though the expression is wide enough to embrace transactions between the Governments.

When Great Britain sells goods or securities or lends money to the U.S. or Canada, the goods and securities must be paid for, and the interest on the money must be met from time to time, and the money itself repaid upon maturity, and these payments must be made upon a gold basis. The U.S. and Canada sell goods and securities and lend money to Great Britain and to each other, and the payments must be made on a gold basis. If the total payments to be made (say during a year) by country A to country B. and by country B to country A, exactly balanced each other, it would not be necessary for either to send to the other any gold in payment. The payments would be made in bills of exchange. The sellers or lenders in each country would draw on the buyers or borrowers in the other. The drafts or bills of exchange would be sold by the drawers to banks and financial houses, and the gold would be obtained for them. These banks and houses would send the bills to their

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agents or correspondents in the country on which they are drawn, and would obtain there the gold for them from the persons on whom they are drawn; or they might themselves sell them there and let the purchaser collect. It is obvious that if the payments between the two countries exactly balanced each other, the demand and supply for bills of exchange in each country would be equal, and the price of a bill over or under par would not be much affected by the law of supply and demand. The bankers' commission, rate of interest and other minor charges would affect the price but slightly one way or the other; but if the total of the payments to be made by one at any particular time exceeded those to be made by the other at the same time then it is obvious that the demand for bills of exchange in the country which was the debtor for the excess would, to the extent of this excess, exceed the supply of bills there, and the price would go up, and gold or credit on a gold basis would have to be supplied to the creditor country to cover the excess.

Many considerations other than the balance arising out of sales and loans sometimes enter into the question of the price of exchange. The subject is a very difficult and complicated one, but this balance is always most important, and sometimes is the governing factor. It is usually referred to as the balance of trade between the two countries, and if the normal balance be quickly disturbed, especially if it be turned from a balance in favour into a balance against, the effect upon exchange rates is immediately apparent. This is what the war has been doing since the end of the period previously referred to, during which the whole system of exchange broke down.

It would not be suited to the simple explanation here made were all the details to be given of the process which has been going on between Great Britain and this continent and affecting the balance of trade. It will be sufficient to mention the main items.

Before the war, Great Britain sold to the U.S.A. and to Canada immense quantities of manufactured goods, and lent them immense sums of money. Since the war these two main items have been greatly reduced, and Great Britain has greatly increased her purchases from the two countries. The balance of trade with the U.S.A., which before the war was in favour of Great Britain, has since been turned into a

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large balance against her, and the balance against Canada which existed before the war has been substantially reduced.

Owing to the war Great Britain's consumption of foodstuffs and war supplies and ammunition has increased enormously. Her production has not kept pace with the consumption; it has in fact decreased in many items. The deficiency embraces items of natural products and manufactures which the U.S. and Canada are at once able in large measure to supply, and both countries are successfully developing the production and supply of other items.

The necessary consequence of this is that the volume of provide in the U.S. and Canada has greatly increased, and the price of exchange drawn in London has consequently gone up. This accounts mainly for the premium of £1 6s. gold and credit on a gold basis which Great Britain must 8d., or $6.46, which has to be paid, as already explained, on every $486.66 (or £100) of a bill drawn in London on Canada. Remember that the price in New York is the governing factor for Canada, and that the balance of trade between the U.S. and Great Britain has for some time been lagrely against Great Britain.

The volume of gold and credit on a gold basis which the U.S. and Canada have to provide in Great Britain has greatly diminished. The demand on this side for bills on London is less than the demand in London for bills on this side, and the necessary consequence is that the price of exchange drawn on London has gone down. This accounts mainly for the discount of $6.41 which has to be allowed, as already explained, on every £100 (or $486.66) of a bill drawn in Canada on London. One interesting question to ask, but a difficult one to answer would be—If it were not for the British Navy how long would the period after August 4th, 1914, during which the entire exchange system broke down, have lasted, and what would have been the result in Canada and the United States?

Z. A. LASH.

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PROPERTY IN WATER.

The High Seas.

The main ocean, being the necessary highway of all nations, and incapable of being continuously possessed, cannot be the property of any one State. After this statement at p. 1 by Coulson & Forbes, 3rd ed., they add at pp. 1 and 2:

"It is possible, however, that a nation may acquire exclusive right of navigation and fishing of the main ocean *as against another nation,* by virtue of the specific provisions of a treaty; for it is competent to a nation to renounce a portion of its rights; and there have been instances of such renunciations both in ancient and modern times:" (citing Phillimore's International Law, vol. 1, pp. 210, 211).

"It would appear also that a nation may give a tacit consent to the appropriation of certain portions of the sea for fishing and navigation by *non user.*"

At p. 5 they say: "Although, as has been stated, the realm of England only extends to low water mark, and all beyond is high seas, yet the common consent of civilized independent States, which constitutes international law, has undoubtedly appropriated a certain portion of the high seas washing the shore of each State to that State for the fuller enjoyment and protection of its rights. The distance to which these so-called territorial waters extend appears generally to be fixed at three nautical miles; but this distance is not absolute, and is liable to be altered by the provisions of particular treaties:" (Phillimore's International Law, vol. 1, p. 237.)

Reg. v. *Keyn,*[1] is considered by Coulson and Forbes as having settled the question whether the dominion which is admitted to exist by the Sovereign of England over such territorial waters is an absolute dominion, so as to constitute them part of the realm of England, and vest the subjacent soil in the Crown, or is a more limited dominion dependent not on original or inherent right, but on the acquiescence of other nations, and so limited by such acquiescence to the particular purposes for which such dominion has been acquiesced in: (Coulson and Forbes, 3rd ed., p. 6.) The decision of the majority of the Court in that case was to the effect, to

[1] 2 Ex. D. 63.

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quote Coulson and Forbes again, that although the common consent of nations had appropriated the sea within three miles of the shore to the adjacent State to deal with as such State might think fit and expedient for its own interests, yet such concurrent assent that a portion of what was before treated as the high seas, and, as such, common to the world, should be treated as British territory, could not of itself, without the authority of Parliament, convert that which before was in the eye of the law high sea into British territory, and so change the law or give to the Courts of this country a jurisdiction over the foreigner where they had it not before.

According to this judgment the realm of England only extends to low water mark, and all beyond is the high seas. But this realm became subject to the appropriation thereof by an adjacent State by the common consent of nations, to the extent of three miles from its shore. This appropriation to be binding in law must have received the assent of the nations who are to be bound by it. And it appears that this assent may be express, as by treaty or the acknowledged concurrence of Governments, or may be implied from established usage: Coulson and Forbes, p. 1, note (2).

In the case of the *Attorney-General for British Columbia* v. *Attorney-General for Canada*,[2] it was said as to the three-mile limit by Viscount Haldane, L.C., delivering the judgment of their lordships:—

> "They desire, however, to point out that the three-mile limit is something very different from the 'narrow seas' limit discussed by the older authorities, such as Selden and Hale, a principle which may safely be said to be now obsolete. The doctrine of the zone comprised in the former limit owes its origin to comparatively modern authorities on public international law. Its meaning is still in controversy. The questions raised thereby affect not only the Empire generally but also the rights of foreign nations as against the Crown, and of the subjects of the Crown as against other nations in foreign territorial waters. Until the Powers have adequately discussed and agreed on the meaning of the doctrine at a Conference it is not desirable that any municipal tribunal should pronounce on it. It is not improbable that in connection with the subject of trawling the topic may be examined at such a Conference. Until then the conflict of judicial opinion which arose in *Reg.*

[2] [1914] A. C. 153.

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v. *Keyn* is not likely to be satisfactorily settled, nor is a conclusion likely to be reached on the question whether the shore below low water mark to within three miles of the coast forms part of the territory of the Crown or is merely subject to special powers necessary for protective or police purposes."

His lordship adds that the question is not one which belongs to the domain of municipal law alone. What appears to be established by *Reg.* v. *Keyn* is that the realm of England extends to low water mark only, and that the part of the high seas which is within three miles from the English coast, *solum et aquam,* is like the high seas the property of no person in the absence of the common consent of nations, supplemented by the legislative authority of England.

The decision in *Reg.* v. *Keyn* was impliedly admitted by the Imperial legislature to be a true statement of the law, for immediately after it was given, an Act entitled the Territorial Waters Act, 41 & 42 Vict. ch. 73, was passed, defining the territorial waters of Her Majesty's dominions to be so much of the sea adjacent to the coast as is deemed by international law to be within the territorial waters of Her Majesty, and declaring that for the purposes of the Act any part of the sea within a marine league of the coast, measured from low water mark, shall be open sea within the territorial waters of Her Majesty's dominions.

At p. 12 Coulson and Forbes summarise the law as follows:—

'The result of the authorities seem to be briefly as follows:—

1. The realm of England only extends to low water mark; all beyond is the high sea.

2. For the distance of three miles, and in some cases more, international law has conceded an extension of dominion over the seas washing the shores.

3. This concession is evidenced by treaty or by long usage.

4. In no case can the concession extend the realm of England so as to make the conceded portion liable to the common law, or to vest the soil of the bed in the Crown. This must be done by the act of the legislature."

Those creeks or arms of the sea which lie within the body of a county are governed in England by the rules of law relating to the seashore and inland tidal waters, while those inlets of the sea which do not so lie within the body of a county form part of the territorial waters of the State, to which

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reference has already been made. The territory or realm of England, according to *Reg.* v. *Keyn,* is that over which the common law of England extends, or, in other words, all that is within the body of a county, and the county extends to low water mark, where the high seas begin. 'Hence those creeks or arms of the sea which lie within the body of a county are governed by the rules of law relating to the seashore and inland tidal waters:' Coulson and Forbes, p. 13. The seashore may be defined as that portion of the land adjacent to the sea which is alternately covered and left dry by the ordinary flux and reflux of the tides.

The property in the soil of the shore of the sea, of estuaries and arms of the sea, and of navigable rivers, between high and low water mark, is *prima facie* vested of common right in the Crown, but it may belong to a subject by ancient grant or charter from the Crown, or by prescription: Coulson and Forbes, p. 23. Continuing, Coulson and Forbes say:—

> 'This ownership of the Crown is for the benefit of the subject, and cannot be used in any way so as to derogate from or interfere with the public rights of navigation and fishery. The *prima facie* right of the Crown to the soil of the bed, as distinguished from the shore of estuaries and arms of the sea within the body of a county, would appear to extend to the whole area affected by the tides and not to depend, as in the case of tidal rivers, on the question of navigability. This question has never been actually decided in this country; but it seems manifestly absurd to suppose that whereas the shores of a tidal creek between high and low water mark *prima facie* belong undoubtedly to the Crown, the soil of the bed should belong to any other person. The beds of these creeks being within the body of a county are within the realm and therefore the property of some one, and not like the sea below low water mark, unappropriated.'

This leaves the question of the ownership of the waters of the estuaries and arms of the sea and of navigable rivers only indirectly answered, such ownership being considered, it seems, of the same nature as the *prima facie* ownership of the seashore by the Crown for the benefit of the public. Such waters are also subject to riparian rights and natural easements similar to those belonging to riparian proprietors above the flow of the tide. Riparian rights are founded on the right of access to the water and not on the ownership of

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the bed or soil underneath. In the case of *Lyon* v. *Fishmonger's Company*,[3] Lord Selborne said:—

> "With respect to the ownership of the bed of the river, this cannot be the natural foundation of riparian rights properly so called, because the word 'riparian' is relative to the bank, and not to the bed of the stream; and the connection, when it exists, of property on the bank with property in the bed of the stream depends not upon nature, but on grant or presumption of law. In some tidal navigable rivers (as the Severn), parts of the bed of the tidal stream belong to riparian owners; and it appears from Mr. Angell's book (often quoted in our Courts), that in Pennsylvania and Alabama, States whose jurisprudence is founded generally on English law, the whole property in the beds of large non-tidal navigable rivers is in the State. The title to the soil constituting the bed of a river does not carry with it any exclusive right of property in the running water of the stream, which can only be appropriated by severance, and which may be lawfully so appropriated by every one having a right of access to it."

2. Water Flowing in a Defined and Natural Channel, as Rivers, Streams, etc.

Phear on Rights of Water makes the following quotation, p. 25, from the judgment of Sir J. Leach, V.-C., in *Wright* v. *Howard*[4]:—

> "The right to the use of water rests on clear and settled principles. *Prima facie*, the proprietor of each bank of a stream is the proprietor of half of the land covered by the stream, but there is no property in the water. Every proprietor has an equal right to the use of the water which flows in the stream; and consequently, no proprietor can have the right to use the water to the prejudice of any other proprietor."

Continuing that author says at the same page:—'And Mr. Baron Parke in *Embrey* v. *Owen*,[5] adopting the language of Lord Denman in *Mason* v. *Hill*,[6] explains that "flowing water is *publici juris* not in the sense that it is *bonum vacans*, to which the first occupant may acquire an exclusive right, but is public and common in this sense only, that all may

[3] 1 App. Cas. 683.
[4] S. & St. 190.
[5] 6 Ex. 369.
[6] 5 B. & Ad. 1.

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reasonably use it who have a right of access to it."' After this use of the views of Vice-Chancellor Leach and of Lord Denham, Phear comments as follows:—

> 'It will be at once observed that the very essence of the doctrine enunciated in these judgments consists in the comprehensiveness which it gives to the "*alienum*" of the maxim. Generally, no doubt, *cujus est solum ejus est usque ad coelum;* but flowing water when it exists in the shape of a defined stream, assumes a character beyond that of mere incident to the land upon which it lies, and becomes, as a whole, from its commencement to its outfall, a distinct subject of property in itself; the stream viewed in this light, apart from the water which constitutes it, is, simultaneously a feature of every person's land through which it passes; as such, each landowner has full right to enjoy it, but he must always remember, that it exists for his neighbours as well as for himself, and that when he does anything to peril its continuity, he is, in fact, directly affecting the actual property of others, and not merely dealing with certain portions of water, which belong to him at the moment, and will become the property of his next neighbor, only in the event of being allowed to pass to him.'

The maxim *cujus est solum ejus est usque et coelum* (he who possesses land possesses also that which is above it) as applied to property in water arising from the ownership of the land over which it flows in a defined stream, has only a limited application, its proper and full effect being confined to water resting on one's land without passing in its defined course to a neighbour's land so as to enable the latter to avail himself of its use for any or all purposes for which he may lawfully use it.

Coulson and Forbes, at pp. 78, 79 say:—

> "A water course," says Woolrych, p. 146, "may be either a real or incorporeal hereditament. If by grant, prescription, or otherwise, one should have an easement of this kind in the land of another person, it would partake of the latter quality; but if the water flow over the party's own land, although indeed it cannot be claimed as *water,* yet it is in effect identified with the realty, because it passes over the soil, and *cujus est solum, ejus est usque ad coelum.*"
>
> "An action cannot," says Blackstone, "be brought to recover the possession of water by the name of water only, but it must be brought in respect of the land which

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lies at the bottom, and the description of it must be—so much land covered with water."

'From this identification of the land with the water a grant of a field or meadow will carry all the timber and water standing and being thereupon. This doctrine is supported by modern authority with regard to standing and percolating water, and also it would appear, with regard to running water which rises and remains for the whole of its course on the land of a single owner, for in such cases the water is the absolute property of such owner and no one is entitled to share the use of it with him (*Holker & Porrit*;[7] *Chasemore* v. *Richards*;[8]) but with regard to natural streams flowing through adjoining lands, the enjoyment of which is only usufructuary and not absolute, the right to use the water has been held in modern cases not to arise from the ownership of the soil on the stream, but from the right of access to it which land-owners on its banks have by the law of nature': *Lyon* v. *Fishmongers' Co.*,[9]

In the case just cited it was said by Lord Selborne among other things:—

"The title to the soil constituting the bed of a river does not carry with it any exclusive right of property in the running water of the stream, which can only be appropriated by severance, and which may be lawfully so appropriated by everyone having a right of access to it."

Coulson and Forbes, after reviewing this case, and the cases of *Chasemore* v. *Richards*,[10] and *Embrey* v. *Owen*,[11] say at p. 80:—

'It would appear, therefore, that the ownership of the bed of a watercourse, not being the natural foundation of the right to the use of the water, the grantee of lands through which there was a water course would have the full use of the water therein, although the bed of the water course were reserved to the grantor.'

Riparian owners on the banks of tidal navigable rivers have rights similar to those enjoyed by riparians above the flow of the tide, those rights being independent of the ownership of the soil of the stream.

The ownership of the beds of inland tidal waters is presumably in the Crown, and this presumptive ownership carries

[7] L. R. 10 Ex. 59.
[8] 7 H. L. 349.
[9] 1 App. Cas. 662.
[10] 7 H. L. 349, 382.
[11] 6 Ex. 369.

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with it the Crown's presumptive ownership of the waters above them, subject to the *jus publicum*. The transfer of the ownership of the beds of such waters carries with it the ownership of any water rights incidental to them. *Burrard Power Co.* v. *Rex.*[12]

The Crown in right of such provinces as have enacted legislation whereby the Crown is presumed to own the beds of all navigable waters within them, or whereby all those portions of territory which do not constitute private property and all navigable and floatable rivers are considered as being dependencies of the Crown domain, is also presumed to be the owner of all such navigable or floatable waters subject similarly to the rights of the public.

In the Privy Council case of *McLaren* v. *Attorney-General of Quebec,*[13] the decision of their lordships turned upon the question whether the ownership of the plaintiff of the land bordering on the Gatineau River extended *ad medium filum aquæ,* and their lordships agreeing with the decision of the trial judge that the river was only *flottable a buches perdues,* and interpreting the terms of the grant to the plaintiffs' predecessors in title as including the lands granted *ad medium,* answered the question affirmatively. Their lordships in the course of their judgment stated that the proper interpretation of Article 400 of the Quebec Civil Code which makes navigable and floatable rivers 'dependencies of the Crown domain' is of great importance as it may be such as to result in the conclusion that the beds of navigable and floatable rivers are public property and as such incapable of being alienated according to the civil law of Quebec. In this case it was not necessary to interpret the Article and their lordships specially declined to do so, following the rule of deciding such questions only when their decision becomes necessary to the decision of a case before them.

Mr. Justice Audette of the Exchequer Court of Canada very properly distinguished from this case the case of *Leamy, et al.* v. *The King,*[14] tried in January last, which also depended on the question whether the ownership of the plaintiffs of lands bordering on the Gatineau River extended *ad medium,* by clearly shewing that the river was partly navigable and floatable by rafts (*trains et radeaux*) and not merely

[12] [1910] A. C. 87.
[13] [1914] A. C. 258.
[14] 15 Ex. C. R. 189.

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floatable for loose logs, and that the lands of the plaintiffs bordered upon a part of this navigable portion which is, therefore, subject to the *jus publicum*. Having interpreted the grant to the plaintiffs' predecessor in title as not having conveyed any part of the bed of the river there, he decided that the plaintiff's lands did not extend *ad medium filum aquæ*. The principle that navigable and floatable rivers in the province of Quebec are *inalienable and imperscriptible* according to the civil law as expressed in Art. 400 of the civil code, was also, rather exhaustively considered in this case. The case has been appealed and tried in the Supreme Court of Canada, in which Court judgment has been reserved. In view of the undecided questions referred to which may be further considered in the Supreme Court, these two cases possess more than ordinary interest.

3. WATER FLOWING NATURALLY, WITHOUT HAVING ANY DEFINED COURSE, AS SPRINGS, SURFACE WATER, ETC., AND WATER NOT FLOWING AT ALL, BUT SEVERED IN A POND OR TANK.

Flowing water has no public character when it is not public and common to all who have a right of access to it. Phear says, at p. 31, as to such surface water:—

> 'Before it arrives at any defined natural channel it belongs solely to the owner of the land which it covers, and he may deal with it as he thinks fit. Such also is the case with water which percolates through the porous basin of a pond, or overflows the edge of a well, or which passes off the surface of the soil, and runs down a road, before, in either instance, it makes for itself some natural channel. And clearly water severed from all other water, as in a pond or tank, and resting solely on the proprietor's own ground, must be in a similar plight. If, however, the natural channel commences at the very source or spring-head, where the water manifests itself, the two parts are inseparable, and interfering with the latter is no longer a matter of private discretion.'

The owner of the land over which such water flows in an undefined channel and in which he has an exclusive right, can abstract it and deal with it as he pleases, no one else having a right to prevent him. Thus in the case of *Raustron* v. *Taylor*,[15] it has been held that the owner of land has an unqualified right to drain it for agricultural purposes in order

[15] 11 Ex. 353.

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to get rid of mere surface water, the supply of the water being casual, and its flow following no regular or definite course; and a neighbouring proprietor cannot complain that he is thereby deprived of such water which otherwise would have come to his land.

The same rules of law as apply to water above the surface have after some difference of opinion, been established in a series of cases to apply to subterranean water percolating through the strata of the earth in no definite or known course. Underground water may, as in the case of surface water, be of a public or of a private nature, and is therefore governed by the same law as applies to corresponding surface water.

Broom in discussing, at pp. 311, 312 the maxim *cujus est solum ejus est usque ad coelum,* says:—

> 'Not only has land in its legal signification an indefinite extent upwards, but in law it extends also downwards, so that whatever is in a direct line between the surface and the centre of the earth belongs to the owner of the surface; and hence the word "land" which is *nomen generalissimum,* includes not only the face of the earth, but everything under it or over it; and if a man grants all his lands, he grants thereby all his mines, woods, waters, and houses, as well as his fields and meadows.'

By this must be meant that he also grants his rights to the waters on his land or under it, subject to the rights which others in common may have in the same by reason of their being *publici juris.*

4. Artificial Streams or Water Courses.

These are such as owe their existence to human labour which has utilized water in its natural state to produce under required conditions, such artificial water courses as canals, sewers, and waterworks. Phear, at p. 34, says:—

> 'One proprietor may by consent of neighbouring land-owners, have cut a water course through their land, for the purpose of carrying off the water pumped from his mine, or of draining his bog; or again a navigation or water company may under proper powers, have made a few channels, conduits, or leads. In cases of this kind, it is convenient to term the stream an artificial stream, and when considering the relations subsisting between the various riparian proprietors, it must be remembered that they are necessarily subservient to the right of those

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other persons, for whose benefit the existence, or at any rate, the present state of the stream was brought about, to reap the advantages intended for them. Each owner of land which borders upon such a stream is bound by positive duty to receive it under such circumstances, as to quantity and quality, and generally to submit to such disadvantages in relation to the maintenance of the stream, as its beneficiaries have a right, either by statute or otherwise, to impose upon him; and if it was originally a natural flow of water, his own rights will follow after this duty, as far as they are not inconsistent with it; but if the water come from artificial sources, he can then claim no right by reason of the stream passing through his land, except the negative right of being protected from any increase of his burthen at the hands, either of the other proprietors, or of the owners and beneficiaries of the artificial stream. In other words, as regards the artificial stream, or the artificial condition of a natural stream, as the case may be the proprietor of the land through which it passes, is subject to an easement, the nature of which is defined solely by contract between him and the person entitled to its enjoyment: but to no one else is he under any obligations in respect of it. The simple fact, that an artificial stream passes through the lands of A and B, respectively, does not render it, like a stream existing naturally, a common subject of property for A and B; they have no rights between each other in reference to it considered as a stream; each may treat it as its own absolute property, subject only to the condition under which he must enjoy every other portion of his property, namely, the observance of the maxim *sic utere tuo ut alienum non laedas*, etc.'

An artificial water-course may be made in pursuance of the grant of an easement, or may be acquired by prescription or agreement. An easement may be defined as a service or convenience which one neighbour hath, without profit upon, over, or from any land or water of another: Gales on Easements, 8th ed., pp. 274, 275.

The easements relating to water-courses are classified by Coulson and Forbes, at p. 238, as follows:—

1. The right to affect or use the water of a natural stream in any manner not justified by natural right—(a) in quantity; (b) in quality.

2. The right to conduct water across a neighbour's land by an artificial water-course, and to go on his land for the purposes of clearing it.

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3. The right to discharge water or other matter on a neighbour's land.

4. The right to go on a neighbour's land to draw water from a well.

The rights of riparian proprietors in an artificial water-course are not the same as the rights of riparians on the banks of a natural stream. They are acquired and not natural rights, and are dependent on the grant by which they have been acquired, or on the nature of the use if the claim is by prescription. An artificial water-course may have been made under such circumstances as to confer all such rights as a riparian owner would have had in the case of a natural stream, etc. Coulson and Forbes, p. 130. It was not intended, however, to deal with artificial water-courses further than this distinction goes, and the law as to property in water generally is only touched in this Article in its main principles.

A. J. McGillivray.

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THE FIRST MEDICAL CASE IN THE PROVINCE.

Before Upper Canada became a separate province, and in 1788, Lord Dorchester divided the country afterwards to be Upper Canada into four Districts, Luneburgh, Mecklenburgh, Nassau and Hesse, the chief part of whose inhabitants were in the settlements at and near Cornwall, Kingston, Niagara and Detroit respectively;—Toronto was then a trading post of no consequence.

In each District was instituted a Court of civil jurisdiction called the Court of Common Pleas: over each Court presided three judges, all laymen, but the Detroit people objected to laymen in their Court, and in 1789 William Dummer Powell, a lawyer in Montreal of Boston birth, was made first (and only) judge of that Court.

In the other Districts, however, the original scheme prevailed: in Mecklenburgh the judges were Richard Cartwright, Neil McLean and James Clark.

Before that Court in the summer of 1790 came the first medical case ever tried within the territory afterwards Upper Canada, and now Ontario.

Macauley and Markland sued James Connor, a surgeon (he is found in the United Empire list as "Surgeon, Hospital Mate') for £43 " 18s. currency ($175.60) balance of account. On March 31st, 1790, the Court sat, all three judges being present—the Sheriff returned the summons duly served—the plaintiffs filed a declaration. Dr. Connor appeared and stated "that the accounts rendered him by the plaintiffs were very inaccurate and many charges made against him which he could not agree to settle in the state it was rendered him, and that the overcharges amounted to £1 " 11 " 6 " ($6.30). Besides he claimed to have an account against Robert Macauley one of the plaintiffs for "medicines and attendance amounting to the sum of £50" ($200). He admitted in answer to a question from the Bench that the firm were not liable for a private debt of Macauley and that in any case Macauley had a private account against him not included in the amount sued for. The Court determined that they must take time to consider the merits of the case and ordered the parties to appear on the first day of July.

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The plaintiffs did so, but the defendant did not, and according to the practice of the Court a default was entered against him; on the 3rd however he appeared in person and had the default removed, and an order made for trial on the following Monday, July 5th.

On that day, Robert Macauley produced his private account for a box of medicine against the defendant £60 ($240), and this account was by order of the Court added to the amount demanded by the declaration. The defendant said the "said chest of medicines was not really worth sixty shillings," but admitted getting it—he produced his account against Macauley for "medicines and attendances in Cureing a broken Leg, amounting to £50." Macauley declared that "the Charge is exhorbitant for the Medicine and Attendance that have been given."

Connor "alledges that his charge is not extravagant nor without a precedent and that the Cure he performed was of a dangerous Nature and that he is Justly entitled to the Amount he demands for the said Cure."

He called a witness, Mr. Joseph Forsyth, who swore that he had "heard it publickly reported in Montreal that Mr. Murray had paid Dr. Bleak Fifty pounds for Cureing a Broken Leg, which was allowed by the Court in that District" whereupon the Court did "not consider themselves Competent to Judge of the Nature of the defendants charge without Consulting the oppinion of professional men upon the Subject and do therefore call upon Jas. Latham and Jas's Gill, Surgeons, for their oppinion."

Dr. Latham said that "charges Generally depend on the Circumstances of the patient and that he had known from Two pounds to One Hundred Guineas paid for cures of this kind"; and that "considering all the circumstances in this Case "he would think himself very Honorably paid by Thirty Guineas" and would think himself entitled to charge that amount.

Dr. Gill had only attended Soldiers, but Professional men in the Province charged from Ten to Seventy Pounds according to Circumstances, he would charge at least Ten Pounds for each Fracture for reducing it alone and for Medicine extra.

The Court took the case under consideration and on the following Thursday, July 8th, 1790. they gave judgment against the defendant for £13 " 6 " 6 currency (=$53.30)

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and costs. It is impossible to say how this sum was arrived at—perhaps the original bill for..... £43 " 18 " 0
was reduced by the amount claimed as reduction by defendant..... £1 " 11 " 6

to..... £42 " 6 " 6
and the defendant was allowed on the balance of his claim for Medical Service over the value of the Chest of Medicine, "not worth 60 shill." £29 " 0 " 0

leaving net balance..... £13 " 6 " 6
but this is a mere guess.

There are several matters of interest in this case which may be noted.

The personnel of the Court—three judges, not one, and these all laymen, not lawyers. Richard Cartwright came from New York State a United Empire Loyalist and became a merchant with a large business and trade connection; he was afterwards one of the members of the first Legislative Council of Upper Canada, being appointed July 16th, 1792, and was one of the two Legislative Councillors whom Simcoe charged (most unjustly) with Republican sentiments. He was the grandfather of Sir Richard Cartwright, James S. Cartwright, K.C., formerly Master in Chambers, both now deceased, and of John R. Cartwright, K.C., our efficient Deputy Attorney-General.

The other two judges were well-known residents and magistrates.

The practice was regulated by the Ordinance passed at Quebec of April 21st, 1785, 25 George III., cap. 2, as modified by the Ordinance of May 7th, 1789, 29 George III., cap. 3. Where, as in this case, the claim was for more than £10 sterling, the plaintiff drew up a declaration setting up his causes of complaint and presented it to a judge. The judge made an order which was presented to the Clerk of the Court who issued a Writ of Summons commanding the defendant to appear upon a day named. A copy of the Writ and of the Summons was served by the Sheriff, and the defendant appearing, the matter was tried. Either party might appear in person, or by attorney, or by written and formal Power of Attorney have some other layman appear and act for him.

By the Ordinance of 1789, sec. 11, in cases in the new Districts any evidence in cases where the title to the free-

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hold was not in question was allowable which satisfied either "the ancient or present Laws of this Province," (*i.e.*, the French Canadian Law) or "the Laws of England."

Either party might call for a jury: but unless a jury were demanded, the case was tried by the judges.

In allowing the set off or counterclaim to be set up, the Court went far beyond the limits at that time observed in English Courts: the evidence as to the amount allowed a surgeon in the Court at Montreal would not now be allowed in any British Court, being the grossest hearsay.

And in conclusion notwithstanding the increase in professional fees and the high price of living, many a medical man even now would consider £50 or $200 a pretty good fee for setting a broken leg—much more 100 guineas.

WILLIAM RENWICK RIDDELL.

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COSTS.

A perusal of the last Volume (7), and of the first few numbers of Volume 8 of the Ontario Weekly Notes suggests some observations upon the present practice and apparent tendencies in the exercise of the judicial discretion as to costs given by section 74 of the Judicature Act.

Statistics are, of course, of little value on such a question, but the following figures are not without interest. Their precise accuracy is not vouched for, but the errors, if any, are so slight as to be immaterial.

Excluding vendor and purchaser applications, and motions for construction of wills or by trustees and executors for advice, the costs of which are governed by special considerations, and excluding also interlocutory proceedings of all kinds, there appear to be 334 reported cases in Volume 7. In 38 of these—that is, in more than 1 case out of every 9—the successful party has been deprived of his costs, and these do not include cases where costs have been withheld on the ground of divided success. This by itself gives cause for reflection. But 148 of these cases were judgments in appeal; only 186 were judgments of first instance. And a refusal to give costs is more common in the latter than in the former class of cases, since, as a general rule, however unmeritorious the conduct of the opposite party, a litigant, like a dog, is entitled to only one worry, and bites twice at his peril. Dividing the cases in this way, it will be found that in 28 out of 186 judgments of first instance—that is, in more than 1 case out of every 7—the successful party has been deprived of his costs. In appeals the proportion is only 1 case in every 15, but in 3 of the 10 cases in appeal the deprivation was made to cover also the costs below.

Now, what are costs? Are they an indemnity for expense necessarily incurred in enforcing a legal right, or resisting an unfounded claim? Or are they in the nature of a bonus for the performance of certain indeterminate and unclassified works of supererogation, not affecting the determination of the legal issues, e.g. being "a little generous" (*Hunt* v. *Emerson*),[1] or being "business-like" (*Denton* v. *Tossy*),[2] *King Construction Co.* v. *Canadian Flax Mills,*

[1] 7 O. W. N. 15.
[2] 7 O. W. N. 15?.

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Ltd.,[3] or for the avoidance of conduct equally without legal effect, and unbecoming to a Christian and a gentleman, as, for instance, being a corporation (*passim*), or resisting a claim by one's mother (*Cumming* v. *Cumming*),[4] or one's wife (*Kaakee* v. *Kaakee*),[5] or "dissuading testators from exercising charitable intentions" (*Snider* v. *Snider*).[6] The former is, in theory at least, the accepted opinion, but there are indications that in practice the latter view is not without weight. Consider some examples from the volume already referred to, and from the first few numbers of Volume 8 of the same series.

Hunt v. *Emerson*,[7] was an action for commission on a sale of land. The plaintiff failed, apparently because the sale was at less than the minimum figure which, under his agreement with the defendant, would have entitled him to commission. Falconbridge, C.J., dismissed the action, but said "The defendant might have afforded to be a little generous. He denies even that he offered the plaintiff $250 for his expenses. (It is to be inferred that the plaintiff had sworn to such an offer, as in the nature of an admission of the defendant's liability for commission). For this and other reasons, in dismissing the action, I make no order as to costs."

Denton v. *Tossey*[8] was an action for specific performance, which failed because the agreement had been delivered as an escrow, and the condition upon which it was to become operative had never been fulfilled. There had also been such delay as would alone have been fatal. The plaintiff's evidence was "very unsatisfactory." "In some respects," says Falconbridge, C.J., "the defendant's conduct was equally unsatisfactory and unbusinesslike; and, while I dismiss the action and give judgment for the defendant for $100 (without interest), I make no order as to costs."

McMullen v. *Wetlaufer*,[9] was an action for malicious prosecution, in which the jury found for the plaintiff on all the issues in their province, with $4,000 damages. But the action was dismissed, because the facts had been fully and fairly laid before the defendant's solicitor and before the

[3] 7 O. W. N. 606.
[4] 4 O. W. N. 91.
[5] 7 O. W. N. 648.
[6] 7 O. W. N. 445.
[7] 7 O. W. N. 15.
[8] 7 O. W. N. 156.
[9] 7 O. W. N. 244, 32 O. L. R. 178.

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Crown Attorney, of whom the former advised, and the latter approved the prosecution, and this, upon well settled principles, constituted reasonable and probable cause. The Crown Attorney had also himself directed the issue of a warrant.[10] Yet Middleton, J., said: "The action fails, but I dismiss it without costs, firstly, because there was malice; and secondly because I desire to express in this way disapproval of the course adopted in issuing a warrant in a case which at most justified only the issue of a summons."

In *Milligan* v. *Thorn*,[11] a fifteen-year-old infant sought damages from his employer for injuries sustained when the horse which he was driving for his employer ran away. He based his claim upon a municipal by-law, enacting that "no vehicle shall be driven upon any street in the city in charge of a driver less than 16 years of age." Middleton, J., found that "the whole accident was the direct result of the plaintiff's own carelessness in the harnessing of the horse," and that, "if the horse had been properly harnessed, he (the plaintiff) was quite competent to drive and manage it." But, without giving effect to these findings, he dismissed the action on another ground, viz. that the by-law was for the protection of the public, and not of the driver of the vehicle. "But I do not give Thorn costs, because he was guilty of an infraction of the salutary provisions of the by-law."

The plaintiff in *Snider* v. *Snider*,[12] was entitled under his brother's will to a legacy of $10,000, less the amount of any note made by him outstanding at the date of his brother's death. He sought (a) a declaration that a note for $10,000, made by him in the testator's favour, had been discharged by an arrangement with the testator, under which the testator had given to him cross-notes for $10,000; (b) to recover on these cross-notes; and (c) to obtain payment of the legacy. The other beneficiaries resisted his claim. Middleton, J., accepted the plaintiff's evidence as to his arrangement with the testator, and had "no doubt that the intention of the testator was that his brother should receive the $10,000." But, apart from any technical difficulty, he dismissed the action, because (a) the plaintiff could not take the legacy while his liability on the $10,000 note remained, and there had been no renunciation in writing by the testator sufficient, in the absence of the destruction of the $10,000

[10] 7 O. W. N. at p. 245.
[11] 7 O. W. N. 210, 32 O. L. R. 195.
[12] 7 O. W. N. 445.

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note, to release the plaintiff from his liability upon it; (b) the cross-notes were without consideration, and had never been intended to be paid; and (c) the testamentary intention of the testator to release or offset the $10,000 note had not been evidenced in writing. Having thus disposed of the plaintiff's case, the learned judge continued: "Those interested under the will are charities, and I hope, in view of the undoubted intention of the testator, that those who take may see fit voluntarily to carry out the testator's wishes." He then encourages them to do so in these words: "There being no room for doubt upon the evidence as to what the testator's intention was, *the resisting of the claim upon these legal grounds is not only ungracious, but is a course calculated to dissuade testators from exercising charitable intentions.* . . . While the action fails, I do not think that costs should be awarded against the plaintiff."

Tighe v. *Township of Tyendinaga*,[13] was an action for damages for injuries, sustained by the plaintiff while employed by the defendant township in a gravel pit, and alleged to have been caused by falling gravel. "Whether he (the plaintiff) slipped and fell, or whether the gravel struck him, however, was a matter of very much doubt." Middleton, J., said that "the plaintiff's story might be viewed with a good deal of suspicion," and he was "rather inclined to think the negligence was that of the plaintiff himself." Apart from this, the action failed, because there was no liability at common law, and no notice had been given under the Workmen's Compensation Act. But the injuries were slight; the plaintiff had made "an excellent recovery . . . and the action ought not to have been brought in the Supreme Court." Nevertheless, "under all the surrounding circumstances," the action "should be dismissed without costs." It would be interesting to know what were the circumstances which so far outweighed those mentioned by the learned judge that the township was compelled to bear its costs on the Supreme Court scale of an action which "ought not to have been brought in the Supreme Court."

The Canadian Pacific Railway Company was convicted under a municipal by-law of the City of Ottawa for committing a nuisance by the emission of smoke from its roundhouse. But the company, as a Dominion railway, was not constitutionally subject to the by-law. The Dominion Rail-

[13] 7 O. W. N. 548.

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way Board had issued regulations upon the subject, and the municipal jurisdiction, if it ever existed, was ousted. The conviction was, therefore, quashed, but "under the circumstances without costs." Why? (*Rex* v. *Canadian Pacific R. W. Co.*[14])

In *King Construction Co.* v. *Canadian Flax Mills, Limited*,[15] the plaintiff claimed damages for breach of a contract to furnish material for the superstructure of a factory. The defendants counterclaimed damages. Neither the facts nor the reasons for judgment are reported, but the defendants succeeded. Falconbridge, C.J., said:—"The proceedings on both sides were unbusinesslike and such as to lead directly and inevitably to trouble and litigation; and so both action and counterclaim should be dismissed without costs."

The defendants in *Baldwin* v. *Chaplin*,[16] had erected a pier 20 feet square in the waters of Lake Erie, some 250 feet from the plaintiff's riparian land, for the purpose of drilling a well for natural gas. The plaintiff sought to restrain these operations and to have the pier removed. He failed, because a structure so far from shore constituted no interference with his private riparian right of access, and he had suffered no such damage as would enable him to complain, in a private action, of the interference with the public right of navigation. He had, in fact, suffered no damage at all. It was shown at the trial that the riparian owner was not the real plaintiff, but that the action was brought at the instance of a rival gas company. Latchford, J., held that the pier did interfere with navigation, and that the defendants had not complied with the provisions of an Order-in-Council authorizing them, under the Navigable Waters Protection Act, to erect the pier. While these considerations had no effect upon the plaintiff's rights, had caused him no damage, and gave him no cause of action, they were sufficient to relieve him from payment of the defendants' costs. Upon an appeal to the Appellate Division, the Court, after demonstrating in an elaborate judgment that, in spite of the alleged interference with navigation, the defendants had a perfect defence, apart altogether from the Order-in-Council, again refused costs.[17]

[14] 7 O. W. N. 568.
[15] 7 O. W. N. 606.
[16] 7 O. W. N. 637.
[17] 8 O. W. N. 349.

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Millar v. *Patterson*,[18] was an action to set aside a tax sale, so far as it affected the easterly 1 ft. 6 in. of a lot, on the ground that there had been no valid assessment. The District Court judge set aside the sale, but, upon an appeal by the defendant, the action was dismissed, on the ground that the assessment had been valid, and that, in any event, the sale was covered by the curative provisions of a subsequent statute. The defendant had, therefore, been put to the trouble and expense of resisting an unfounded claim by the plaintiff, and the triviality of the amount involved seems to be a reason rather why the plaintiff should not have brought the action than why the defendant should have acceded to his demand. But the Court said (p. 717), "There remains to be considered the question of costs. Surprise is not unnaturally excited that in a matter in which so small an amount is at issue the opposing parties did not see their way to settle their differences without resort to the Court, where in such a case the expenditure of time and the expense must inevitably be out of proportion to the interests at stake. Litigants who, under such circumstances, unreasonably indulge in what is not infrequently termed the luxury of a lawsuit, must be aware of the certainty of loss, whatever may be the result of the action. The present is not a case where costs should be awarded; and there will, therefore, be no costs of the appeal."

Smith brought an action against Haines for certain relief, upon the basis that Haines had defrauded him. Falconbridge, C.J.,[19] held that fraud had not been proved, and dismissed the action. But he said, "I am by no means satisfied with the defendant's conduct or his evidence. It is reasonably plain that he has not been "perfectly clear in his dealings with the plaintiff" to adopt the phrase of the Lord Chancellor (Chelmsford, L.C., in *Mowatt* v. *Blake*,[20]); and, while I dismiss the action, I do so without costs." Upon an appeal by the plaintiff, a new trial was ordered;[21] costs of the former trial and of the appeal to be in the cause. The second trial resulted exactly as the first had done. "The plaintiff," said Middleton, J.,[22] "has failed to prove

[18] 7 O. W. N. 714.
[19] 5 O. W. N. 866.
[20] 31 L. T. O. S. 387.
[21] 6 O. W. N. 150.
[22] 8 O. W. N. 235.

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the fraud charged, and so his action fails, but the defendant's conduct is such that he ought not to receive costs, *even though the particular fraud alleged had not been proved.* He most certainly has not been "perfectly clear in his dealings with the plaintiff," *or with others;* and, in adopting this expression, I am using milder language than I contemplated before reading what my Lord (Falconbridge, C.J.), has written." The defendant, therefore, had to bear the expense of three unsuccessful attempts by the plaintiff to fasten fraud upon him, because his conduct in matters not affecting the issues had not met with the approval of the Court.

Not the least striking case of the collection is the latest, *Ballantyne* v. *T. A. Eansor & Co.*,[22] an action by an employee for damages for injuries sustained in the defendants' works. Lennox, J., thought that "the merits were pretty clearly with the plaintiff," but the jury, though invited to find negligence of a kind which was supported by the evidence and would have entitled the plaintiff to judgment, negatived this by finding instead negligence of which there was no evidence, and which, in any case, would have given no cause of action to the plaintiff. The action was therefore dismissed, "*and, as the defendants in the circumstances should not ask for costs, without costs.*"

It would be profitless to discuss at length the practice as to the costs of interlocutory motions, though there is ground for thinking that such costs are too lightly made "in the cause." Surely it ought to be only in exceptional cases that a party is put in danger of having to pay the costs of an unsuccessful proceeding by the other side. One extraordinary instance of the contrary view, which came not long ago under the writer's notice, may be mentioned. A motion was made to quash an appeal to the Appellate Division, on the ground that it was out of time. The theory upon which the motion was based was that the Christmas vacation was to be reckoned in the time for appealing. As soon, therefore, as counsel for the appellant referred to Rule 179 (*e*), the motion collapsed, and was dismissed. But the costs were made costs in the cause. If the chances against the success of an appeal be taken as 4 to 1 (probably much too favourable odds), the Court, which knew nothing of the merits, condemned the appellant, in a case involving but a small amount, to a 4 to 1 chance of having to pay both

[22] 8 O. W. N. 297.

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his own and his opponent's costs of this rather flagrant piece of carelessness on the part of his opponent's solicitor. So patently mistaken was the motion, that the appellant ought to have been sure of recovering his costs of it either from the respondent or from the respondent's solicitor; and it would have been no more than fair if the respondent's solicitor had not been allowed to collect his own costs from his own client. But to give him an excellent chance of recovering them from the appellant was to offer an encouragement to hasty and ill-conceived proceedings, of which unencouraged human indolence and incapacity provide quite enough.

In the light of the examples given above, and the many others which might be referred to, it may well be asked what a man must do or avoid, to be saved in the matter of costs. While no definite or exhaustive answer is possible, it is evident that a high standard of general personal morality is necessary, even though deviation from that standard may have caused no legal *injuria* to the opposite party, or have given him no legal ground for resisting the offender's claim.

So far, a man's duty towards God has not yet been imported into the discussion, and it is apprehended that, as the practice now stands, an avowed atheist or agnostic would have as good a chance of getting his costs as a true believer. But recent illustrations may be found of deprivation of costs for breach of most of the more definite requirements of a man's duty towards his neighbour, as well as of some which find no place in the catechism. For example:—To love, honour and succour one's father and mother (*Cumming* v. *Cumming*,[24]); to honour and obey the King and all that are put in authority under him (*R.* v. *C. P. R., supra*); to hurt nobody by word or deed (*Tighe* v. *Township of Tyendinaga; Ballantyne* v. *T. A. Eansor & Co., supra*); to be true and just in all one's dealings (*Smith* v. *Haines, supra*); to bear no malice or hatred in one's heart (*McMullen* v. *Wetlaufer, supra*); not to covet nor desire other men's goods (*Curry* v. *Girardot*,[25]). Indeed, some of the decisions, *e.g.*, *Hunt* v. *Emerson* (*supra*), seem to be referable only to the wider and less definite duty "to do to all men as I would they should do unto me."

[24] 4 O. W. N. 91.
[25] 7 O. W. N. 642, 645.

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Was it ever intended by the legislature that the judicial discretion as to costs should be exercised in the interests of an ill-defined *censura morum*, which is, for all practical purposes, not subject to appeal? Is it desirable that it should be so exercised? And is it sufficiently borne in mind, in exercising the discretion, that costs are an indemnity in theory only? In point of fact, as everyone knows, taxed costs and actual costs are very different things. The more costly litigation, the wider is the discrepancy between them. And this is quite apart from the worry and loss of time which litigation involves. Merely to have been compelled to bring or defend an action is, except in very flagrant cases, quite sufficient punishment for discreditable conduct on the part of a plaintiff or defendant. Litigation itself is so much a thing to be avoided that it seems hardly necessary to add to it a new terror in the shape of a vague and arbitrary discretion as to costs.

That the discretion exists is, of course, indisputable, and the moment this is admitted, it becomes impossible to lay down any binding rules for its exercise. To say that it is to be exercised "judicially," is, for practical purposes, to say nothing at all. This limitation upon the discretion has always existed, but it has availed little against the vague sentimentalism and vicarious generosity which appear to inspire the present practice in Ontario. It is also necessary that there should be material upon which the discretion can be exercised, otherwise a deprivation of costs is not really an exercise of discretion at all (*Civil Service Co-operative Society* v. *General Steam Navigation Company*,[26] and it is open to question whether the decisions in *Hunt* v. *Emerson*, *Snider* v. *Snider*, *Tighe* v. *Tyendinaga*, *Millar* v. *Patterson* and *Ballantyne* v. *T. A. Eansor & Co.* (*supra*), are consistent with this rule. Moreover, the misconduct for which costs are denied must be connected with the litigation (*King* v. *Gillard*,[27]), where the Court of Appeal reversed Kekewich, J., who had deprived successful defendants in a passing-off action of their costs on the ground that their wrappers, while not colourably resembling those of the plaintiffs, contained statements calculated to mislead the public). Apart from these restrictions, the discretion appears to be theoretically unlimited, and practically not subject to review, if

[26] [1903] 2 K. B. 756.
[27] [1905] 2 Ch. 7.

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it has been exercised as a discretion, and not upon some erroneous principle. Strictly speaking, therefore, most of the Ontario decisions above mentioned were probably correct enough. But this is not to say that the method of exercising the discretion, which they illustrate, ought to be continued.

In cases where a party is obliged to ask for a favour, *e.g.*, an amendment, it is fair and reasonable that he should have no costs, at any rate up to the time when the favour is granted. So also it is reasonable that a party should have no costs who has succeeded in an appeal upon fresh evidence, or upon a point not taken below. Again, it is right that, where success is substantially divided, there should be no costs, or that each party should have the costs of the issues upon which he has succeeded.

But, apart from such cases as these, it is submitted that it is only in the very rarest instances that a successful party should not have such indemnity as taxed costs afford him for his trouble and expense in maintaining his position, if that position be legally tenable. Why, for example, should the discretion as to costs be used for the purpose of tempering the supposed harshness of a statute requiring notice of action, especially when the statute itself provides that the Court can upon reasonable ground extend the time or dispense with the notice? Or why should a successful defence based upon the Statute of Frauds, or upon some statute imposing a time limit for bringing the action, so often fail to carry costs? It is to be assumed that the legislature considers such statutes to be in the public interest, or it would never have passed, or would since have altered or repealed them. Further, it must be borne in mind that the plaintiff is, or, but for carelessness or incompetence, would be, perfectly aware of the existence of the statute before he brings his action, and it is usually very much easier to make up one's mind beforehand as to the validity of a legal defence of this kind than of a defence which will depend upon questions of fact. The plaintiff brings his action with his eyes open, in the hope or belief that he can make good the contention that his case does not fall within the statute. If he fails, why should he not pay the costs caused by his mistaken and unsuccessful effort? Why should he be permitted to take a chance at the defendant's expense? If the legislature which has passed the statute considers that a success-

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ful defence based upon it should not entitle the defendant to costs, it can say so. But, so long as it has not said so, is it right that the Court should withhold costs on the ground that the defence which the legislature has seen fit to give is "technical" or "unmeritorious," or that the "merits" are with a plaintiff, who has brought an action of a kind which the legislature, for reasons of public policy, has done its best to discourage, or under circumstances in which the legislature has said that such an action shall not be brought.

It is submitted that the discretion as to costs is not really "judicially" exercised at all, when it is used for the purpose of mitigating the rigours of the common or statutory law of the province. That is for the legislators. And, except in the most flagrant and exceptional cases, a litigant who brings or defends an action in a Court which is a Court of law and not a Court of morals ought to be able to count upon getting his costs, if he be legally right, and, if he be legally wrong, upon having to pay the costs of the other side.

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CONVEYANCING IN THE PROVINCE OF QUEBEC.[1]

A solicitor who has had experience as a conveyancer in any of the other Canadian provinces is at first disappointed when he finds on coming to Quebec to practice that in Quebec the bulk of the conveyancing is done by Notaries who, as is well known, belong to a distinct profession founded on the French Notarial system. An Advocate may not be a Notary or a Notary an Advocate, at one and the same time. In a few cases young men take the examinations and qualify as Advocates and Notaries and then elect. Occasionally after practicing a number of years as a Notary, a man will qualify as an Advocate as in the case of Mr. Justice Mathieu (for many years a Professor at Laval University) who sat for twenty-five years as a judge of the Superior Court and whose experience as a Notary is thought to have made him a stronger lawyer.

Promise of Sale. The principal steps taken in connection with the sale and purchase of a lot of land are as follows. No doubt there are more sales where a part only of the purchase price is paid and in most of such cases a promise of sale is given by the vendor. There is no statutory form. The land must be described by a cadastral number, the subdivision number, and usually also by metes and bounds.

Cadastre, sometimes cadaster, is of course a French word meaning an official statement or register of the quantity, and ownership of real estate.

In Montreal where there are so many expropriations it is advisable to include a clause providing for the respective rights of the parties in the event of the property being expropriated during the term of the promise of sale.

Article 1590 of the Civil Code provides: "In the case of sales and expropriations for purposes of public utility the party acquiring the property cannot be evicted. The hypothecs and other charges are extinguished, saving to the creditors their recourse upon the price and subject to the special laws relating to the matter."

[1] This article was originally written for the C. L. T. but owing to the change of Editors, was overlooked. It has since been published in the Michigan Law Review for April last, with whose kind acquiescence, we now offer it to our readers.—Editor C. L. T.

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The small red seal is not commonly used in completing agreements. These agreements of sale are rarely registered. In most carefully drawn promises of sale there is a clause prohibiting the registering of the documents and this is a wise provision, otherwise an unscrupulous person might tie up a valuable property for months or perhaps years and force the owner, as has been done, to pay an amount in order to have removed what any person searching the title would be justified in calling a cloud on the title.

To make registration possible, the agreement must be signed in the presence of two witnesses (or be in notarial form) one of whom must make an affidavit as to the execution of the agreement. Even though this provision is complied with the registration of the agreement does not bind the land unless the purchaser has actually taken possession of the land. The Code seems quite clear as to this but during the last year the Superior Court in the case of *Courville* v. *Wilder* (Mr. Justice Archibald), decided that a unilateral promise of sale or option does not bind the land and should not be registered.

As a rule in this province, the wife of the vendor does not sign the agreement of sale of property owned by the husband or held in community but of course she must sign if it is her separate property and the husband must sign also. As usually no search has been made of the title at the time of taking the promise of sale the better practice is to have the wife renounce her dower right unless one is perfectly sure the wife is not entitled to dower. The immoveables which the consorts possess on the day of the marriage or which come to them during its continuance by succession or equivalent title are separate property.

All property held in community may be sold by the husband without the signature of the wife. When property is held in community all the moveable property owned by the consorts at the time of the marriage or which they acquire during marriage or which falls to them during that period by succession or by gift, if the donor or testator have not otherwise provided, and also all the revenues, interests and arrears arising from the properties real and personal which belonged to the consorts at the time of the marriage or which has come to them during marriage by any title whatever, belong to the community. The immoveables they acquire during the marriage belong to the community. The wife

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has a dower right (usufruct for the wife and ownership for the children) in one-half of all the immoveables owned by the husband at the time of the marriage and all immoveables which he receives during the marriage by succession from his ascendants. This right can only be renounced if done in writing and specifically by the wife.

A sale of the husband's land under execution does not bar the dower. The wife need not pay succession duty on her dower.

Search of Title. In most cases the title deeds are kept together and are given to the person searching the title for perusal at his office. These are not the original title deeds, if completed by the Notary, but certified copies as the originals remain in the office of the Notary, and such originals need not be produced even in Court unless the Notary attends Court and produces the document asked for. A certified copy serves for registration purposes so that authentic deeds are registered in two places, namely, with the Notary and at the registry office.

Registration is at length or by memorial. When registered at length the title or document is recorded or extracts certified and delivered by a Notary or by a prothonotary of the Superior Court which extract must contain the date, place of execution and nature of the instrument, the names and descriptions of the parties to it, the name of the Notary before whom it was received, the clauses or parts of clauses extracted at full length and the date on which the extract is delivered which date must be noted on the originals.

Registration by memorial is effected by means of a summary setting forth the real rights which the party interested wishes to preserve, and this is recorded. The memorial must be signed by the party interested and attested to by two subscribing witnesses.

Under Article 1218 of the Civil Code: " Copies of notarial instruments and of extracts therefrom, of all authentic documents whether judicial or not, of papers of record, and of all documents and instruments in writing, even those under private signature, or executed before witnesses, lawfully registered at full length, when such copies bear the certificate of the registrar, are authentic evidence of such documents, if the originals have been destroyed by fire or other accident, or otherwise lost."

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In all formal documents and when bringing or defending actions in Court the maiden name of the wife is used and, particularly in connection with titles, this makes it much easier to trace family connections. A married woman is described as Dame Jane Brown, wife of John Smith. Fortunately in this province great care has been exercised since the earliest days as to the keeping of the records of births, deaths and marriages.

In most cases documents showing a complete chain of title are handed to the purchaser and also an abstract signed by the registrar of deeds which gives the date and a brief description of each document registered against a particular lot. It is generally necessary to have the registrar's abstract brought down to date. If any of the title deeds are missing (and this is the exception) one must visit the registry office, or as is oftener done, order copies from the Notary if the documents are authentic.

The advantages of the system of registering against each separate lot are considerable, particularly in a large city, and no doubt some of the other provinces will adopt a similar system as their population increases unless they do better still and follow the good example of the Western provinces, which have adopted the Torrens system. I have very clear recollections of searching the title of land of John McDonald at the office of the Registrar of Deeds for Cape Breton County Nova Scotia, there being at least fifty landowners in the county named John McDonald. However, when one wishes to record a judgment here in a hurry he is apt to wish he could record it in any county or district where the judgment debtor is likely to have property without the necessity of first learning exactly what lots are owned by the debtor so that the judgment may be registered against each particular lot. Of course a search must be made for unpaid municipal taxes and if the property is or has been owned by a member of the Roman Catholic Church a search must be made for any unpaid tithes or any specific Church tax. A search must also be made at the office of the collectors of succession duties.

About one-quarter only of the land of the Province is still held under Seigniorial tenure, most of the land once under this tenure having been commuted, that is, a sum has been paid in full settlement of the rights of the Seignior, the land being held according to the Code "in free and common soccage." Some land is held under what is called a "consti-

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tuted rent," and the land is referred to as a "constitute." The capital sum to be paid is constituted or fixed and the occupier has in many cases ninety-nine years in which to pay it and in the meantime pays yearly or half yearly an amount equal to agreed interest on the capital sum which may by law be paid off at any time.

In searching the title of land situated in this province and held by a company incorporated outside of this province it is necessary to see that the permission of the Quebec Government has been granted authorising such a company to hold land situated within the Province of Quebec so as to comply with the statute of Mortmain. Such right is granted by Order in Council on application to the Provincial Secretary.

Deeds. When the solicitor's report on the title is completed and if everything is found in order the deed is to be prepared. The form of deed is not statutory but the form in common use is very similar to that used in the other provinces. Again one notices the absence of the small red seal even where the deed is "under private writing." If the vendor or purchaser are outside the province they must appoint a person within the province by power of attorney to appear on their behalf to sign the deed. It is difficult to see the necessity of putting purchasers to this extra expense or of requiring purchasers to sign the deed. If the purchase price is paid in full and the purchaser takes delivery of the deed and possession of the land there can be no question as to the transfer having been completed. If there is any real necessity for the purchaser to sign, persons living in the other provinces and the adjoining states would have (which is not the case) very great difficulty with their deeds of sale. This provision of course has the effect of making it necessary to complete all deeds before a Notary in the province except in the case of deeds which may be made in the presence of two witnesses one of whom makes an affidavit as to the execution of the deed.

The following documents must be in notarial form:—marriage contracts, deeds containing gifts *inter vivos* and acceptances of the same, inventories concerning successions, community property or the like, awards of arbitrators, deeds of sale of real estate and conventional hypothecs unless the land is held in fee simple (as in the case in Montreal and surroundings) or is situated in the Counties of Missisquoi,

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Shefford, Stanstead, Sherbrooke and Drummond (whatever may be their tenure). Such mortgages may be in the very short and comprehensive form specified in the fifty-eighth section of chapter thirty-seven of the Consolidated Statutes of Lower Canada.

Hypothecs. If part of the purchase price is to be secured by a mortgage, one document serves the purpose of a deed and mortgage and in such cases there is a real necessity for both parties signing. The usual form of mortgage contains practically the same clauses and conditions as are ordinarily used in the other provinces. The mortgage bond is included in the mortgage.

Hypothecs are (1) legal, resulting from the law alone, (2) judicial, resulting from judgments or judicial acts, and (3) conventional, resulting from an agreement. Married women have a legal hypothec for all claims and demands which they may have against their husbands on account of whatever they may have received or acquired during marriage by succession, inheritance or gift.

Conventional hypothecs must give the designation of the coterminous land, or of the number or name under which it is known, or of the lot or part of the lot and range, or of its number upon the plan and book of reference of the registry office, if such plan and book of reference exists.

Some loan companies make it a rule to insist on the wife renouncing her dower in every mortgage which they take as security.

The mortgage is made as brief as possible, the conditions being in a second document which is referred to in the mortgage as being a part thereof. The main mortgage only is registered, the saving in fees being considerable.

An action for the foreclosure of a mortgage is much the same as in the other provinces and fortunately there are comparatively few foreclosure actions in the District of Montreal or throughout the province. At the different registry offices a special book is kept for the address or election of domicil of all hypothecary creditors and of every transferee, heir, donee or legatee of an hypothecary creditor. The registrar must be given the address from time to time of the hypothecary creditor, and that being done, the registrar (who is always notified of sales under seizure or in suits for partition

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or of an application for the confirmation of a title) must immediately send by registered letter to each hypothecary creditor whose name is entered in the register of addresses a notice that the land hypothecated to him is under seizure or to be sold by order of the Court as the case may be and of the time and place of the sale.

Prior to 1904 there was doubt as to the safety in loaning to a married woman money secured by a mortgage. Article 1301 of the Civil Code prior to 1904 provided "A wife cannot bind herself either with or for her husband, otherwise, than as being common as to property; any such obligation contracted by her in any other quality is void and of no effect."

The case of *Trust & Loan Co.* v. *Gauthier,* R. J. 2, 12 K. B. p. 231, decided finally by the Privy Council in 1903, held that where a loan is obtained by a married woman separated as to property from her husband, with hypothecation of her real estate, it is sufficient to show that the money although handed to her in the form of a cheque payable to her order, was not used by her, but was given to her husband, in order to bring the contract within the prohibition of Article 1301, Civil Code. Held further that the law does not require that the person from whom a wife obtains a loan should know that it is for the benefit and use of her husband. It is for the lender to exercise proper caution, and to see to the due employment of the loaned money for the purposes of the wife, even in the case of a deception by the wife, as to the use to which the money is to be applied. The legislature in 1904 added to Article 1301 of the Civil Code the words "saving the rights of creditors who contract in good faith." Since then more loans have been made to married women but even now some loan companies and some individuals prefer not to take mortgages from married women. When such mortgages are completed it is necessary for the wife (and the husband who must join in the mortgage) to make statutory declarations that none of the money advanced has gone to the husband for his use.

Chattel Mortgages. No chattel mortgages can be given in Quebec by individuals, but during the last session of the legislature joint stock companies were given the right to give a trust deed securing an issue of bonds or debentures on any of their property, moveable or immoveable, present or future.

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The trust deed must be completed before a notary and must be registered where the property is situated and where the head office of the company is situated. No doubt, individuals, registered companies and partnerships will before long be granted the right to mortgage their personal property.

This provision does not interfere with or limit the right of companies to pledge their moveable property but the possession of the property must not remain in the possession of the pledgor. The seller of goods may enforce a lien in writing giving him the right to recover the goods if the purchaser fails to complete his payments and there is no necessity to register such liens which are very common. Notice of such a lien must be given to a landlord in order to bar his right to hold the goods covered by the lien. The notice may be given to the landlord at any time but before repossessing the vendor must pay any rent which is due on the date on which the notice is given. The seller also has the right to recover his goods if still in the possession of an insolvent provided the goods were delivered within thirty days just prior to the insolvency.

Transfers and mortgages of ships as in the other provinces are made under the provisions of the Merchant's Shipping Act.

Marriage Contracts. Marriage contracts contain clauses varying the law of community or the dower rights so as to meet the wishes of the parties, or, as is most usual, contain the following clauses: (1) That the parties shall be separate as to property. (2) That the dower of the intended wife is renounced. (3) That the wife shall be the owner of the household goods, and (4) That the intended wife shall have the right to take at any time a sum of money the amount depending on the financial standing or financial expectations of the intended husband.

It is almost the invariable rule for residents of the cities and towns of Quebec, of the commercial and professional classes, at least, to have a marriage contract. In such contracts almost invariably the wife to be renounces her dower.

The question sometimes arises as to whether when the household goods have been seized for a debt of the husband the wife can claim the household goods. The jurisprudence holds that she may if the goods were owned by the husband at the time the marriage contract was completed provided the

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debt was not incurred before the date of the marriage contract. The wife is an ordinary creditor in the event of the insolvency of the husband for the amount donated to her under the contract provided the intention is clear that she had the right to the amount at once and not a mere right of survivorship and provided that at the time the contract was completed the husband was solvent and that no fraudulent intent can be shewn.

Marriage contracts must be completed before a Notary and must be registered at the registry office of the district where the husband is domiciled. Marriage contracts completed outside of Quebec province while the husband is domiciled outside Quebec province are considered binding here if the parties later become domiciled here even though the contract is completed under private writing.

Wills. Wills are (1) notarial, (2) holograph, or (3) "in the form derived from the laws of England." Wills completed before a notary need not be probated but a certified copy must be filed at the succession duties office together with the declaration usual in such cases. If there is a devise of real estate the notary on the death of the testator delivers to the proper registrar a notice containing the date of the death, a description of the land and the name of the devisee or devisees and also a copy of the will thus completing the chain of title at the registry.

The best practice now is to have the receivers of the succession duties intervene in the notice to avoid possible delay later by the loss of the certificate shewing that the succession duties have been paid.

Holograph wills must be wholly written by the testator and signed by him and require neither notaries nor witnesses and no particular form is required. Such wills must be probated, that is proven on the affidavit of some one who can swear positively as to the handwriting of the testator. Applications for probate are made *ex parte* at what is known as the Tutelle Office (Tutorship Office) and if there are any unusual circumstances it is necessary to go before a judge, usually the judge for the time being sitting in the Practice Court.

Wills in the English form "must be in writing and signed at the end with the signature or mark of the testator made by himself or by another person for him in his presence and

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under his express direction, (which signature is then or subsequently acknowledged by the testator as having been subscribed by him to his will then produced), in the presence of at least two competent witnesses together, who attest and sign the will immediately in the presence of the testator and at his request." Such a will is probated on the affidavit of one of the witnesses. It will be noted that the attestation clause is similar to the clause used in the other provinces except that the witnesses must sign the will "immediately." Recently a client of mine while at the hospital had his will completed by a Notary. When he returned to his house he wrote a holograph will but did not appoint a trustee or executor and did not devise and bequeath all his property. He then asked to have a will prepared in the English form but did not have the strength to sign it. The holograph will was probated and that part of his estate which was not dealt with in his will was of course dealt with as if he had died intestate.

Some time ago I was asked to probate a will partly printed and the remainder written and signed by the testator. The witnesses had signed and the attestation clause was complete except for the absence of the word "immediately." Neither of the witnesses could take the required affidavit as they had not been present together. I made an application to have the will probated as a holograph will. The Tutelle Office referred me to the Practice Court Judge, Mr. Justice Charbonneau, who took the common sense view that there could be no question as to the intention of the testator who left all his property to his wife.

Wills made in Lower Canada or elsewhere by military men on active service out of garrison, or by mariners during voyages, or on board ship or in hospital, which would be valid in England as regards their form, are likewise valid in Lower Canada.

It is important that the exact words of the Code be used in the attestation clause as a warning as to just what is required to make the will valid.

The system which takes the place of the probate or Surrogate Court and which appears to be perfectly satisfactory is as follows: Some legal representative or legatee makes what is called a declaration of Transmission setting forth the date of the death and the names of the devisees and legatees (if there is a will) and otherwise the legal representatives.

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Usually some person interested in the estate (when the deceased has died intestate) is appointed as attorney for all the heirs. A number of originals of the declaration and the power of attorney are completed and on the strength of those and the certificate from the succession duties office the bank deposits, share certificates and other personal property are readily transferred to the rightful owner.

Partnership Declarations. Partnership articles are much the same as in the other provinces. A declaration must be filed at the registry office as in the other provinces, and the declaration must state whether the partners are separate or in community as to property. If there is a marriage contract the date of it must be given and the name and address of the Notary before whom it was completed.

HOWARD S. ROSS.

Montreal.

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CURRENT COMMENTARY UPON ENGLISH AND CANADIAN DECISIONS.

ENGLISH DECISIONS.

Appointment by trustee of his solicitor as co-trustee.—In *In re Cotter, Jennings* v. *Nye*,[1] a surviving trustee under a Will appointed as a new trustee a member of the firm of solicitors who had acted for himself and his co-trustees in a dispute between them and a *cestui que trust*, who was the plaintiff objecting to the appointment in these proceedings. Ashbury, J., holds the appointment valid; and that although the Court would not itself make such an appointment, it would not remove such trustee already appointed. He says (p. 340): "It is quite clear, of course, that the donee of a power cannot appoint himself, and it is suggested—and it is argued on behalf of the plaintiffs—that the power of appointing new trustees being a fiduciary power, the appointment of the solicitor in the present circumstances is vitiated for the same reasons as the appointment by the donee of himself was vitiated in the case of *In re Skeats*,[2] where it was held that a power of appointing new trustees was a fiduciary power, and the donee of such a power could not appoint himself. I do not think myself that the decision in that case really assists me at all. The appointment of another person is subject to totally different considerations from the appointment by a donee of himself, and the contention that the appointment is *ipso facto* bad because the surviving trustee has appointed one of the members of his own solicitor's firm trustee must, in my judgment fail."

Another point decided in this case is that, an order of the Court directing some specific enquiry, to wit, in this case, enquiries with a view to settle a scheme for the maintenance and education of infants interested under the trusts of a Will, but not directing administration, is not such an order as will prevent the persons having the power of appointment of new trustees from exercising that power in the ordinary way unless the enquiries are such that such exercise will interfere with their being carried out by the Court.

[1] 84 L. J. Ch. 337.
[2] 58 L. J. Ch. 656; 42 Ch. D. 522.

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Fire Insurance—Arbitration Clause.—The point decided by the House of Lords in *Jureidini* v. *National British and Irish Millers Ins. Co. Ltd.*,[3] is that when an insurance company repudiates a policy altogether, and contends that all benefit under it has been forfeited, it cannot set up the arbitration clause as a bar to an action on the policy. The following passage from the judgment of Haldane, L.C., indicates the grounds upon which the House proceeded:—

> "No doubt it is true that the policy contains an arbitration clause with a very stringent addition to it to the effect that the going to arbitration is a condition precedent to the right to sue; and if that had been all, if the action had been brought upon a policy containing such a clause, and no more had happened, then, on principle and on authority, the claim could not have been maintained without fulfilling the condition precedent, because by the law of this country you can make most contracts which you desire to make, and amongst others a contract that you will not come under liability under a contract unless that liability is defined in a particular way, it may be by an arbitrator; and *Scott* v. *Avery*,[4] is a decision of this house to the effect that that is the law . . . But the present case is different. There has been in the proceedings throughout a repudiation on the part of the respondents of their liability, based upon charges of fraud and arson, the effect of which, if they are right, is that all benefit under the policy is forfeited. But one of the benefits is the right to go to arbitration under this contract, and to establish your claim in a way which may to some people seem preferable to proceedings in the Courts; and accordingly that is one of the things which the appellant has, according to the respondents, forfeited with every other benefit under the contract. Now, speaking for myself, when their is a repudiation which goes to the substance of the whole contract, I do not see how the person setting up that repudiation can be entitled to insist upon a subordinate term of the contract still being enforced."

Costs—Separate issues — Jurisdiction of Taxing-Master.—*Bush* v. *Rogers*,[5] was an application before Bankes, J., occasioned by the recent decision of the Court of Appeal in *Howell* v. *Dering*,[6] noticed at some length by us, *supra*, p.

[3] 84 L. J. K. B. 640.
[4] 25 L. J. Ex. 308; 5 H. L. C. 811.
[5] 84 L. J. K. B. 686, [1915] 1 K. B. 707.
[6] 84 L. J. K. B. 198, [1915] 1 K. B. 54.

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335. That case decided, as Bankes, J., says: "That it was wrong to assume that because separate questions were put to a jury each question necessarily constitutes a separate issue." Consequently Bankes, J., decides that it is for the judge who tries a case to say whether there is any separate issue upon which the unsuccessful party is entitled to costs; and that in the absence of any direction a Taxing-Master has no jurisdiction to allow such costs: and, generally, in every case, whether tried by a jury or not, the judgment should contain a direction as to what costs, if any, either party is entitled to.

Malicious prosecution—Summons before justices for not abating a nuisance.—Wiffen v. *Bailey and Romford Urban District Council,*[7] is an instructive case, before the Court of Appeal, on the subject of actions for malicious prosecution. The point decided is that a complaint under sec. 95 of the Public Health Act, 1875, for non-compliance with a notice to abate a nuisance will not support an action for malicious prosecution, even though preferred maliciously and without reasonable and probable cause, because it is not in itself a proceeding of such a nature as is calculated to involve damage to the fair fame, or liberty through danger of imprisonment, of the person against whom the complaint is made. All the judges concur, and the following extract from the judgment of Phillimore, L.J., will shew the grounds upon which they proceed.

> "I assume that this was a prosecution in a criminal matter, but that, in my opinion, is not sufficient to support an action for malicious prosecution. The three canons laid down by Lord Holt in *Savile* v. *Roberts,*[8] have been accepted ever since, and they were specially referred to with approval by this Court in *Quartz Hill Consolidated Gold Mining Co.* v. *Eyre.*[9] Those canons or conditions of such an action are, first, that there must be damage to a man's fame, as if the matter whereof he is accused be scandalous; secondly, damage to the person, as where a man is put in danger to lose his life, or limb, or liberty; and thirdly, damage to a man's property, as when he is forced to expend his money in necessary charges to acquit himself of the crime of which he is accused. . . . The only expenses in the present case are the difference

[7] 84 L. J. K. B. 688, [1915] 1 K. B. 600.
[8] (1698) 1 Ld. Raym., at p. 378.
[9] 52 L. J. Q. B. 488, 490, 492; 11 Q. B. D. 674, 683, 689.

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between the costs allowed to the plaintiff by the justices and the additional costs incurred by him in defending the proceedings. So far, at any rate, as this Court is concerned, we are bound to hold—and I see no reason to dissent from this view—that those extra expenses are not legal damages. The next question is whether the plaintiff was put in danger of losing his liberty. In my opinion he was not. It is quite true that if upon the hearing of the summons an order had been made against him, not merely to cleanse the room, but to pay a penalty and costs, and he did not pay, and a warrant of distress was issued and no sufficient distress was found upon the premises, he might have been sent to prison. But . . . that has never been considered as sufficient to support a suggestion that the man's liberty is put in peril within the head of damage stated by Lord Holt. Every case where an injunction is obtained against a person may lead to a motion for committal for contempt of Court and to the defendant being imprisoned. . . . There remains the last head of damage—namely, that to a man's fame, as if the matter whereof he is accused be scandalous. . . It seems to me that what one must look at is, not what might be proved in the course of a prosecution, but what is enough to support a conviction upon the information or indictment. If it will be enough to support a conviction upon the information or indictment that the person charged has done something which does not injure his fair fame, no scandal is involved in the prosecution. In the present case the only complaint is that the plaintiff, being the occupier of a house and having had a notice served upon him to strip the paper off the walls in certain rooms and to cleanse the rooms, within twenty-one days, has not complied with the notice. It does not follow that he is responsible for the condition of the premises, or responsible for any appreciable length of time . . . It seems to me that it would be going too far to say that that kind of prosecution involves a scandal . . . The case of *Quartz Hill Consolidated Mining Co.* v. *Eyre, supra,* shews that there are certain forms of civil proceedings, though within very narrow limits, which may give rise to an action for malicious prosecution, because, as the Court says, the bane comes before the antidote, and mischief may be done which it will be too late to overtake. I think that Sir Herbert Stephen is right in his book on Malicious Prosecution, (p. 19), in treating an action for maliciously taking proceedings in bankruptcy and that class of action as not

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being strictly actions for malicious prosecution, but closely analogous thereto. Upon the whole I come to the conclusion that this is not a case in which an action for malicious prosecution will lie."

To explain the latter part of this passage, we may quote the words of Buckley, L.J., at p. 692:—

> "The exception of civil proceedings, so far as they are excepted, depends, not upon any essential difference between civil and criminal proceedings, but upon the fact that in civil proceedings the poison and antidote are presented simultaneously. The publicity of the proceedings is accompanied by the refutation of the unfounded charge, if it be unfounded, which was made."

Damages—Unwitting committal of criminal act through negligence of another party—Costs of Defence.—R. Leslie Ltd. v. *Reliable Advertising and Addressing Agency, Ltd.*,[10] is a decision of Rowlatt, J., on the somewhat curious point, that one who has innocently done an act punishable under a criminal statute, through *bona fide* reliance on a perfectly legal contract of another party, not in fact carried out, cannot recover from the defaulter under the contract the penalty or costs of defence incurred by him in the proceedings taken against him under the statute. The statute was the Betting and Loans (Infants) Act 1892, and the offence was sending to a minor a circular inviting applications for loans. The plaintiff had employed the defendants, an Advertising Agency, to send out the circulars to the parties named in Kelly's Handbook of the Titled, Landed, and Official Classes for 1914, after deleting therefrom the names of all minors. The defendants by mistake addressed a circular to a minor, and the plaintiffs, in ignorance of that fact, posted the same to the addressee. Having been prosecuted, convicted, and fined under the above statute, they now sued the defendants to recover, as damages for breach of the agreement aforesaid, the expense they had thus been put to. Rowlatt, J., gave the plaintiffs nominal damages of 1s. for breach of contract; but as the defendants had paid £5 into Court, he held them entitled to the general costs of the action, the plaintiffs to have the costs of proving the breach of contract. He says, (pp. 722-3):—

[10] 84 L. J. K. B. 719, [1915] 1 K. B. 652.

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"The position is that a contract, reliance upon which in sending out the circulars was a default made a crime by statute, is now made the basis of an action to recover, as damages, compensation for the punishment in which such reliance has involved the plaintiff. I confess that, when first I saw the nature of this action, I formed and indicated a strong opinion that it was misconceived on the broad ground that a person convicted of a criminal offence could never have the assistance of a civil Court to ease himself of the punishment by the recovery over either of the amount of any fine or costs or of damages to compensate him for any imprisonment, and that there could be no difference between cases where the legislature had made an act or default punishable as a crime without the existence of a guilty mind, and any other class of offence . .

In support of this view it may be said that a law which imposes a punishment, as distinguished from a payment of compensation, is defeated by the punishment being passed on to another. The object sought to be secured by such a statute in the public interest is not that so much money shall be collected by way of fine, but that a person who puts himself in such and such a position shall be punished by way of fine, in order to make such person prevent such things happening again; and I should have thought that the statute could not have its effect if the convicted person could obtain compensation in a civil Court for the punishment inflicted upon him in the criminal Court. There are, however, authorities the other way. . . . It seems to me, however, that giving the fullest effect to all that was said or even suggested in *Burrows* v. *Rhodes*,[11] this action fails . . . If the substance is looked at, what the plaintiffs were convicted of was sending the circular without having reasonable ground for believing the addressee to be of full age. They knew what grounds they had—namely, their contract with the defendants—and it was insufficient. They knew the facts which constituted the offence. It is not to the point to say that the defendants contracted to omit the minors, and that they cannot be heard to say that the plaintiffs had not good ground for believing every recipient of the circular to be of full age. The action fails on the ground of the plaintiff's illegal action, whether the defendants do or can allege it or not."

Charterparty—Sale of ship before execution of Contract —Parties to Contract.—In *Keighley Maxted & Co.* v. *Dur-*

[11] 68 L. J. Q. B. 545, [1899] 1 Q. B. 816.

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ant,[12] in which the House of Lords decided that a contract made by one who does not profess at the time to be acting on behalf of a principal, cannot be ratified by another, as though in the capacity of a principal, so as to render the latter able to sue or liable to be sued upon it,—Lord Halsbury, L.C., says:—"The parties to the contract who have already bound themselves by it, are just as much part of the contract as any other part of the contractual obligations entered into." The recent case of *Fratelli Sorrentino* v. *Buerger*,[13] shews that we must not apply these words too universally. In fact it illustrates the universal rule that the *dicta* of judges are always to be read in connection with the facts of the case before them at the time. Judges do not profess to speak with the precision and exactness of analytical jurists when they deliver their judgments. In the case last referred to it was decided by Atkin, J., that unless it is of the essence of a contract of charterparty—as, of course, it could be made to be—that the owners of the ship concerned should remain owners of it until the termination of the contract, they can perform the contract vicariously, as, e.g., through purchasers from them of the ship, and the charterers are not entitled to refuse to accept performance by the purchasers, and will be liable in damages to the owners,—subject to the rights of the purchasers and owners *inter se*—for breach of contract if they do so. Atkin, J., says, at p. 728:—

> "In this case the point is raised as to the effect upon a charterparty of the sale by the owners of the ship to a purchaser between the date of the charterparty and the date of its completion, the purchaser getting the benefit of the charterparty. It is a remarkable fact that there is no direct authority upon this point, and I have therefore to deal with it upon general principles. It appears to me that, under ordinary circumstances, it is clear that a party to a contract cannot assign that contract so as to relieve himself of the liability imposed upon him in respect thereof. He cannot, against the consent of the other party to the contract, substitute for himself another person who is to be the only person liable to perform the obligations of the contract. On the other hand he can, in many cases, enter into an arrangement by which some other person may perform for him his obligations of the contract so far as he is concerned, and the other party to the contract must

[12] [1901] A. C. 240.
[13] 84 L. J. K. B. 725, [1915] 1 K. B. 307.

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accept the performance of those obligations, provided that it is a performance in accordance with the terms of the contract. He will, however, be entitled to rely on its proper performance and to hold the original contracting party liable for any breach of the contract, and he need not look to the substituted person in any way. . . . There are indeed, some contracts which a contracting party must perform himself, and he may not perform them through an agent or other person whom he may choose by arrangement to provide for the purpose. Such contracts are those which require, under the particular circumstances, some special degree of personal skill, taste, a judgment on the part of the contracting party—as, for example, a contract to paint a picture, or a contract to write a play or a book. These are merely typical instances, and there are, of course, other contracts of a similar kind. . . . I have to decide this—namely, whether, merely by the sale of the vessel, together with the obligation undertaken by the purchasers, the owners have precluded themselves from suing on this contract. I do not think they have. I do not regard this contract as a special personal obligation imposed on the shipowners. No doubt obligations have to be performed, but the contract is simply that the steamer shall proceed to a port, there load a cargo from the shippers, convey it to another port, and then discharge the cargo upon payment of the freight. . . . It does not, however, appear to me to be of the essence of the contract that the original owners of the steamer shall remain owners until the termination of the contract."

Claim by lessor against mortgagees of lease for rent.—In *Purchase* v. *Lichfield Brewery Co.*,[14] the facts were these. By an agreement in writing, not under seal, dated October 27th, 1908, the plaintiff agreed to let to one Lunnis for the term of fifteen years at a yearly rent payable quarterly, a licensed house in Hereford, and Lunnis agreed therein not to assign the term without the plaintiff's consent, such consent not to be unreasonably withheld. By an indenture dated October 28th, 1908, and made between Lunnis and the defendants, Lunnis assigned to the defendants by way of mortgage the term. The defendants received and accepted the assignment, but they neither executed the indenture nor took possession of the premises, the subject of the term and assignment. They did, however, advertise the sale of Lunnis' interest in

[14] 84 L. J. K. B. 742, [1915] 1 K. B. 184.

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the premises, and they applied in their own names for a renewal of the license in order to obtain compensation under a certain Licensing Act. The plaintiff now sued the defendants for rent alleged to be due from them as assignees of the term. The defendants, however, contended, and the Court (Herridge and Lush, JJ.), now upholds them, that there was neither privity of estate nor privity of contract between themselves and the plaintiff, and consequently no liability on them to the plaintiff for the rent. Lush, J., says (p. 745):—

> "In my opinion the case stands in this position: The tenant under the agreement, with a right to call for specific performance of the agreement, assigns his rights under the agreement to assignees. No term was ever created by the agreement, and consequently no term ever vested in the assignees; therefore there was no privity of estate between them and the landlord. They never went into possession of the premises the subject-matter of the agreement, nor were they recognised by the landlord; therefore there was no privity of contract. Specific performance of a contract cannot be decreed against a person with whom there is neither privity of estate nor privity of contract, and consequently these assignees, the appellants are not liable to perform the terms of the agreement, and the appeal must be allowed."

Criminal law—Plea of guilty wrongly entered.—The short point affirmed and illustrated by the Court of Criminal Appeal in *Rex* v. *Golathan*,[15] is that "it is a well-known principle of our law that a man is not to be taken to have admitted that he has committed an offence unless he pleads guilty in plain, unambiguous, and unmistakeable terms." The appellant was indicted with entering a dwelling house by night with intent to steal. He admitted that he entered the house, but not that he had done so with intent to steal. A plea of 'guilty' was thereupon entered, and after proof of previous convictions the appellant was sentenced to seven years' penal servitude. The Court quashed the conviction on the ground that the plea of the appellant was not a plea of 'guilty' at all, and no man should be convicted upon an ambiguous plea. They held that the appellant had really never been tried; and, that although they had power, under these circumstances to order that the appellant should be kept in custody until the case was tried, they determined

[15] 84 L. J. K. B. 758.

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under the circumstances not to take that course, but to discharge the appellant, leaving the prosecution to proceed with the trial on the indictment if they thought fit.

New trial on one point only, being a point not at issue in the previous trial—Discovery of fresh evidence.—*Robinson* v. *Smith*,[16] undoubtedly calls for special notice, Buckley, L.J., calling it "unique." The action was breach of promise of marriage. The sole defence a denial of the promise. The plaintiff, who described herself as a spinster, obtained a verdict for damages at the trial in February, 1914. The defendant now, after considerable unnecessary delay, applied for a new trial on the ground of the discovery of evidence that the plaintiff was a married woman at the date of the alleged promise. Buckley, L.J., says at p. 785:—

> "One of the recognised grounds on which a new trial may be granted is that the verdict appealed against was based on surprise, mistake, or fraud. The defendant here relies on fraud. If the plaintiff was a married woman at the date of the promise, then in my opinion she did obtain the verdict in her favour by fraud . . I do not think there ought to be a new trial for the purpose of re-opening the question of damages, or the question whether a promise was made or not. Those questions have been tried on proper materials, and the verdict so far as they are concerned ought to stand. But, the defendant asking leave to amend his defence by alleging that the plaintiff was a married woman at the date of the promise, I think the case should be sent down for a new trial on that point alone."

Bankes, L.J., concurred. Pickford, L.J., however, dissented saying (p. 785):—

> "I do not consider it is necessary to discuss whether a new trial can be ordered on a question which was not in issue at the original trial. Nor do I think it necessary to discuss the nature of the evidence on which a new trial can be ordered. But even assuming that a new trial can be ordered on evidence of quite a different nature from any evidence given at the trial, in my opinion, to justify ordering a new trial on the ground of the discovery of fresh evidence, that evidence must be very clear and very strong indeed. I am not at all satisfied that the evidence which has been adduced here is evidence on which a new trial ought to be granted."

[16] 84 L. J. K. B. 783, [1915] 1 K. B. 711.

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Money-lenders Act—'Harsh and unconscionable'—Questions of law for judge.—Abrahams v. *Dimmock*,[17] is a judgment of the Court of Appeal requiring notice on two points. The first consists of the interpretation of sec. 1 of the Imperial Money-lenders Act, 1900. This enactment provides that:—

> '1. Where proceedings are taken in any Court by a money-lender for the recovery of any money lent after the commencement of this Act . . . and there is evidence which satisfies the Court . . . that the amounts charged for expenses . . . are excessive, and that, in either case, the transaction is harsh and unconscionable . . . the Court may re-open the transaction, and take an account . . . and relieve the person sued from payment of any sum in excess of the sum adjudged by the Court to be fairly due in respect of such principal, interest, and charges. . . .'

All the judges concur in holding that whether the transaction is harsh and unconscionable, and whether the interest charged is excessive, are questions of law for the judge, and ought not to be left to a jury: but that the jury may be asked to find any facts which the judge may think necessary for his decision of the questions of law. Now there are clauses in this English section which are not in sec. 4 of our Ontario Money-lenders Act (R. S. O. 1914, ch. 175), but notwithstanding, it seems probable the decision will be applied to and govern our clause. This reads as follows:—

> '4. Where in respect of money lent, the Court finds that having regard to the risk and to all the circumstances the cost of the loan is excessive and that the transaction is harsh and unconscionable, the Court may—
>
> (*a*) Re-open the transaction and take an account between the creditor and the debtor . . .'

Pickford, J. (at p. 812) says:—"The analogy of the action for malicious prosecution seems to me to be a somewhat close one, and the function of the jury in this case seems to be very much the same as the function of the jury in that case."

The other point to which it is expedient to call attention in this case is this. It appears to be well-settled in England, that on appeal from a County Court judge, the Court of Appeal will not adjudicate upon a point of law which was not raised before the County Court judge. Now the Court held

[17] 84 L. J. K. B. 802, [1915] 1 K. B. 662.

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in *Abrahams* v. *Dimmock* that where the County Court judge raised a point of law himself at a trial, heard some discussion and some authorities cited upon it, and came to a conclusion contrary to the opinion he had first expressed,—the point of law had been raised at the trial for the purposes of an appeal. It is just the sort of small point on which it is difficult to find authority when you want it.

Notice to quit—Option reserved to withdraw—Ambiguity of notice.—May v. *Borup*,[18] is a useful decision under the law of landlord and tenant. Under the lease of a studio, it was provided that the tenancy might be determined by six months notice on either side to be given on March 1st or September 1st in any year. On December 23rd, 1913, the tenants wrote to the landlord as follows: "We very much regret having to give you notice to quit the studio *at the earliest possible moment.* We are hoping to effect a satisfactory re-organization of our film enterprise shortly after Christmas, *in which case the notice will be cancelled;* but should our expectations not be realised *we naturally wish to relieve ourselves of the studio at the earliest possible moment, unless in the meantime we see some other use for it.*" A Divisional Court holds this a good notice to quit determining the tenancy on August 31st, 1914. The points of decision are well indicated by the following extract from the judgment of Lawrence, J.:—

> "Two contentions were put forward: First, that the notice was bad as being too vague and uncertain by reason of the expression 'at the earliest possible moment.' I do not think that these words are too vague to constitute a good notice to quit. It is clear law that a notice to quit must be certain, and in order to be certain must be clear and unambiguous; but in my opinion the words 'at the earliest possible moment' mean the next termination of the tenancy in accordance with the terms of the agreement. In the present case the six months' notice to be good must be given so as to expire on March 1st or September 1st, in any year, and the notice to expire on September 1st, 1914, was given on December 23rd, 1913—that is, before March 1st, 1914. The 'earliest possible moment' would therefore be the end of a period of six calendar months from March 1st. Then it is contended that the notice is bad because it is optional. If there is a reservation in the letter containing the notice I do not

[18] 84 K. B. 823, [1915] 1 K. B. 830.

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think it is one affecting the validity of the notice. It is merely a reservation informing the landlord of his tenant's hope and fears as to the future. The tenant says that in a certain event the notice which he has given will be cancelled—that he intends to exercise a right which, in my opinion, he did not possess. Having given the notice, he had no power to cancel it, and I think it wrong to read that expression of intention as a condition attached to the notice. He could then only enter into fresh negotiations with his landlord."

Contract for work to be done upon goods—Sub-contract—General lien—Particular lien.—In *Cassils & Co.* v. *Holden Wood Bleaching Co.*,[19] a case before the Court of Appeal, the plaintiffs were owners of a quantity of calico, which they had sent to a firm of "printers" to be "printed." The printers had delivered them, without any express authority from the plaintiffs, to the defendants to be bleached; and had afterwards gone into liquidation. Upon the plaintiffs then demanding back the calico from the defendants, the latter claimed a lien on them: not only a particular lien for the price of bleaching, but also a general lien for money due on a balance of account between themselves and the printers. The actual decision of the Court is one of questions of fact, namely that neither an alleged custom in the calico-printing trade entitling bleachers to retain goods delivered to them for bleaching under a lien for the general balance of account between them and printers so delivering such goods, nor an implied authority alleged to have been given by the plaintiffs supporting the defendants' demands had been proved. But though thus turning upon questions of fact, the case calls for special mention on account of the lucid statement of the law governing the case given by Buckley, L.J., who says, at pp. 839-841:

"The general proposition which I want to state in ascertaining what the law is on this subject is this—that if as between A and B certain contractual rights and duties are created, it may very well be that B is not bound to perform his contractual duties himself.[20] It depends on the nature of the contract. B may be entitled to sub-contract with C to do for him, B, some part of the work which he, B, has contracted to do for A. If the state of things be

[19] 84 L. J. K. B. 834.

[20] See as to this, the case of *Fratelli Sorrentino* v. *Buerger*, noted *supra*, p. 612.

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merely that, A is not concerned in any way with the subject-matter of the contract between B and C; B may enter into such sub-contract with C as shall pass on to C the whole or part of, or anything that is consistent with, the rights which A has conferred upon B he cannot pass more."

He then cites *Buxton* v. *Baughan*,[21] and Baron Alderson's words in that case—"If you trust your goods into a man's possession, and he makes a bargain about them without your authority, you are not bound by that bargain, and may reclaim the goods," and proceeds:

"This general proposition is subject to qualification according to circumstances. There are, I think, two classes of cases in which the circumstances are such as to prevent it from being applicable. In the first place, there are cases where the goods come into the possession of a person under circumstances under which he is bound to receive them. He does not contract that he will take them, so he is not bound contractually; but he is bound to receive them because of the common law obligation upon him so to do, and then the common law raises in him a certain right. Those are cases which are not cases of contract at all, but of common law right flowing out of common law obligation. The instances that occur to me are two—that of the innkeeper and of the common carrier. An innkeeper is bound to receive his guest and his guest's goods; he does not contract to receive him; the guest comes in and insists on being received. Then the common law gives the innkeeper a right of lien . . . . The other class of case is where, as between the owner of the goods and the intermediate person who passes on the good to the third party there is an implied authority in the intermediary to bind his principal in respect of the manner in which the goods are dealt with . . . The case of *Singer Manufacturing Co.* v. *London and South-Western R. W.*,[22] illustrates both the propositions which I have been stating. That was a case in which a sewing machine had been let out on hire, and the Court came to the conclusion that in that class of contract it was contemplated that the person who had taken the sewing machine on hire would travel about with it, and for the purpose of travelling about with it might leave it at a cloak-room, and thus incurs cloak-room charges. The question was as to a lien for a cloak-room charge on

[21] 6 Car. & P. 674.
[22] 63 L. J. Q. B. 411, [1894] 1 Q. B. 833.

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the sewing machine. Mathew, J., and Collins, J., in the first part of his judgment, rested the case upon the first doctrine which I have been stating—that, as against the owner of the chattel, the railway company, who were bound to take it and carry it, were entitled to a lien apart from contract altogether, because there was a common law obligation to receive it and a common law lien consequent on receiving it. That was the first head. Mr. Justice Collins also put it on the second head, and put it in this way. He said: 'I think in this case the lien may also be rested on another ground; and that is, that the person who deposited this machine was, as between himself and the owner of it, entitled to the possession of it at the time he deposited it. He was entitled to it under a contract of hire, which gave him the right to use it, I presume, for all purposes incident to such a contract, and among them, I take it, he acquired the right to take the machine with him if he travelled, and to deposit it in a cloak-room if he required to do so.' That of course was implied authority. If he had implied authority there was a lien against the owner of the goods. Those being the principles of law, I next have to apply them to the facts of this case."

There was another point in the case. On the defendants' invoices and on their correspondence paper there was a printed notice that all goods received by them would be subject to a lien for the general balance of account. Pickford, L.J., at p. 846, refers especially to this, where he says:—

"No doubt the bleachers put on their invoices the note that has been mentioned, which purports to subject all goods to this lien; but this note cannot, without the consent of the owner of the goods, create a lien upon any goods except those belonging to the persons delivering them, and the defendants would know that—at least, they ought to know it, because it is the law."

Attempting to obtain money under false pretences.—Rex v. *Light*,[28] is a decision of the Court of Criminal Appeal holding that it is not an essential element in the offence of attempting to obtain goods under false pretences that the mind of the prosecutor shall have been affected by the false pretences. Rowlatt, J., says (p. 866):—

"It is abundantly clear that a prisoner cannot be convicted of the offence of obtaining goods or money by false pretences unless the mind of the prosecutor has been misled by the false pretences. But in our judgment, it is a com-

[28] 84 L. J. K. B. 865.

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plete fallacy to suppose that the same principle has any application in the case of an attempt only."

Landlord and Tenant — Distress — Goods comprised in hire-purchase agreement.—Jay's Furnishing Co. v. *Brand & Co.*,[24] is a decision of the Court of Appeal under the Law of Distress Amendment Act, 1908, which will doubtless govern the construction of our own Act (R. S. O. 1914, c. 155, s. 31). These Acts, it will be remembered, deprive the landlord, as against tenants, lodgers, and other persons, of his common law right of distress in certain cases; but provide that they shall not apply to goods comprised in (*inter alia*) any hire-purchase agreement. The hire-purchase agreement in this case provided that the hirer of the goods should punctually pay the weekly rent (and expenses of collection of any arrears), on the dates mentioned, and that if he made default, the agreement should *ipso facto* 'be determined,' and the hirer should return the goods to the owners, who should be entitled to re-take possession of the same, and for that purpose to enter upon the premises; and that the hirer should remain liable for arrears of hire up to the date of the determination of the agreement. The hirer made default in payment of the weekly rent, and the owners gave him notice terminating the agreement, and then endeavoured to enter and re-take possession of the goods. In the meanwhile these had been distrained for rent by the hirer's landlord. The unanimous decision of the Court is that the words 'be determined' must in view of the whole agreement, be construed as meaning 'be determinable' at the option of the owners; and that by reason of the provision conferring on the owners the right of entering and re-taking the goods, and of the provisions relating to the hirer's continued liability for arrears, and expenses of collection, the agreement did not determine on the breach by the hirer, but was in existence at the date of the distress, and that, consequently, the goods were, at that date, comprised in a hire purchase agreement, within the meaning of the Act, and exempt from distress. The view of all the judges is well expressed by Phillimore, L.J., when he says (p. 873):—

"I rest my judgment entirely upon the license to enter upon premises in order to re-take these goods. For that purpose the true purchase agreement remains in force. I do not say that contractual rights—as, *e.g.*, for pay-

[24] 84 L. J. K. B. 867, [1915] 1 K. B. 458.

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ment, or for damages for breach—may not remain and yet the goods cease to be comprised in a hire purchase agreement, but I do say that when any right in respect of the goods, remains, which can only be claimed under the operative agreement, so long the goods are comprised in a hire purchase agreement within the meaning of the section. It seems to me that this is the sense and intention of the statute. Here it is necessary for the furnishing company to have recourse to the license contained in this hire purchase agreement in order to get the benefit which they seek, and this furniture, therefore, remains comprised in the agreement."

A. H. F. L.

CANADIAN CASES.

Trading Corporation — Libel.—In *Price* v. *Chicoutimi Pulp Co*,[1] it was held by the Supreme Court in one of its rare moods of unanimity that where a libel conveys imputations calculated to injure a trading corporation in respect of its business, the corporation can maintain an action for damages. Duff, J., in the course of his remarks, agreeing that the jury had been misdirected, and that there should be a new trial, said: "The defence of justification fails unless the defendant justifies every injurious imputation which the jury find to be conveyed by the publication. The defence of fair comment fails unless the jury find that the imputation, although defamatory and not proved to be true, was made fairly and *bonâ fide* as the honest expression of the opinion held by the defendant, and is in the opinion of the jury warranted by the facts in the sense that a fair-minded man might on those facts, hold that opinion. It is also essential to this defence (as regards imputations which the defendant fails to prove to be warranted in fact) that he must have stated them not as facts but as inferences from other facts."

Contract—Breach—Substantial or Nominal Damages.—The strongly contested case of *Wood* v. *The Grand Valley R. W. Co.*,[2] has now gone through its fourth Court, and the judgment of the Appellate Division of Ontario ordering a reference to determine the amount of damages affirmed. It will be remembered that in that case the Grand Valley Rail-

[1] (1915) 5 S. C. R. 179.
[2] (1915) 51 S. C. R. 283.

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way Co. and P., its president, induced certain persons to subscribe for bonds of the company. The inducements held out to the purchasers, who were all interested in the town of St. George, was that P. and the Railway Company would, in consideration of this purchase, procure an extension of the Railway Company's system to St. George, and give St. George the benefit of competitive freight rates, by a through traffic arrangement with the Canadian Pacific Railway. Interest was paid on the bonds for five years when payments ceased. The work was commenced but never completed. The plaintiffs sued, claiming a return of their money as on a total failure of consideration; and in the alternative for damages for breach of contract. It was evident that they could not succeed on the first count; but the trial judge (26 O. L. R. 441), held that they were entitled to substantial damages, and gave judgment for $10,000 (the par value of the bonds) and directed a return of the bonds on payment. This judgment was varied in the Divisional Court (27 O. L. R. 556), but in the Appellate Division it was held that the purchasers were all entitled to substantial damages; and a reference was ordered as to the amount. The Supreme Court (Fitzpatrick, C.J., Davies, Anglin and Brodeur, JJ., Idington, J., dissenting) affirmed this decision. In the opinion of Davies, J., the case came quite within the reasoning and the judgment of the Court of Appeal in *Chaplin* v. *Hicks*.[3] There the plaintiff was one of the competitors for a prize. A breach of contract deprived him of all chance of obtaining the prize. It was held that he was entitled to recover substantial, and not merely nominal damages, although it was clearly impossible to estimate with anything approaching mathematical accuracy the damages sustained.

Private International Law.—In the case of *Canadian Pacific R. W.* v. *Parent*,[4] Duff, J., and Anglin, J., gave expression to opposite opinions on the applicability of *Machado* v. *Fontes*.[5] The action was brought in the Province of Quebec by the widow of the deceased who had been killed in the Province of Ontario. Duff, J., said:—

> "It is not, as I understand it, disputed that if these alleged contracts would be no answer to the respondent's

[3] [1911] 2 K. B. 786.
[4] (1915) 51 S. C. R. 234. *Supra* p. 531.
[5] [1897] 2 Q. B. 231.

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action in Ontario, she is entitled to recover in these proceedings; and as in my opinion the defence based on these contracts fails, it will not be necessary to consider the possible rights of the respondents on the opposite hypothesis. I will only observe that to me it is not obvious that the decision of the Court of Appeal in *Machado* v. *Fontes* furnishes the rule of decision governing the Courts of Quebec in similar cases; or that article 1056 C. C. has any application where the wrong from which death results, as well as the death itself, occur outside the Province of Quebec."

Anglin, J., held that although no action would have been maintainable in Ontario, for it would have been barred by the contract signed by the deceased, (thus differing from the rest of the Court), nevertheless in Quebec where there is no rule of law giving the representatives a right of action only if the deceased himself would have had such right, the action would lie; for, applying *Machado* v. *Fontes,* though the wrongful act had been committed in Ontario it was of a class actionable in Ontario.

Mortgage—Part of Principal Postponed—Foreclosure as to part.—Thomson v. *Willson,*[6] shews the danger of pushing an unreasonable doctrine, even though apparently supported by *dicta* of considerable antiquity, into a Court which has power to overrule them. In this case it was contended on the authority of *Cameron* v. *McRae,*[7] that where any part of moneys due under a mortgage cannot be recovered (by reason of an agreement postponing repayment of $1,000 until a certain infant should come of age), no proceedings for foreclosure of any part of the mortgage debt can be taken. The Supreme Court, varying the judgment of the Appellate Division (31 O. L. R.) held that the acceleration clause did not apply to the $1,000; but that the postponement of the time for payment of this portion of the mortgage debt did not disentitle the mortgagee to his remedy of foreclosing for the balance due.

License to go on Premises—Breach of Contract—Damages.—It does not take long for an English case laying down a new principle to be followed in this country. In *Barns-*

[6] (1915) 51 S. C. R. 307.
[7] 3 Gr. 311.

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well v. *National Amusement Co.*,[8] the plaintiff purchased a ticket and was entering the theatre when he was compelled to leave by a constable acting under orders from the defendants. It was held, following *Hurst* v. *Picture Theatres Ltd.*[9] that he was entitled to remain, and that the damages awarded, $50, were not excessive. McPhillips, J.A., dissented, distinguishing the above mentioned case, and expressing his full agreement with the dissenting judgment of Phillimore, L.J.

Negligence of Police Officer—Action against Municipal Corporation.—In *Gibney* v. *Town of Yorktown and James Reid*,[10] we have a case in which action was taken against a Municipal Corporation for the negligence of a Police Officer. There was no new law laid down in the case; which is noted here simply because it illustrates a rule of law sometimes overlooked by the profession. The Police Officer in question, who was Constable and Town Marshal and also occupied several other positions of like nature for the Town of Yorktown, in pursuing his duties was endeavouring to capture a dog running at large in the town. Being unable to do so he fired a pistol shot at it. The shot struck the pavement and was deflected, striking the infant plaintiff and inflicting injury. The learned judge found that there was negligence on the part of the defendant in discharging a loaded pistol in the streets of the town where people were passing from time to time. Following *McCleave* v. *City of Moncton*,[11] he found, however, that the Town itself was not liable; for Police Officers can in no respect be regarded as agents or officers of the City. Their duties are of a public nature. Their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising a function of government, but this does not render them liable for their unlawful or negligent acts. Like cases are *Wishart* v. *City of Brandon*,[12] and *Haford* v. *New Bedford*.[13] See *Pon Yin* v. *City of Edmonton*.[14] In the result judgment was given against the Police Constable for doctor's bills, nursing attendance and medicine amounting to $205, and for damages to the infant

[8] (1915), 31 W. L. R. 542.
[9] [1915] A. C. 1.
[10] (1915) 31 W. L. R. 523.
[11] 32 S. C. R. 108.
[12] 4 M. R. 453.
[13] 82 Mass. 290.
[14] 31 W. L. R. 402.

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plaintiff $200. The action was dismissed against the Town of Yorktown with costs.

Forged Transfer—Certificates of Title issued thereon.—*Brown* v. *Broughton*,[15] is an important decision of a judge of first instance on the question whether a good and indefeasible title can be transmitted to an innocent party for value by a forged transfer under the Manitoba Real Property Act, (known in Ontario as the Land Titles Act). Curran, J., after a discussion of English and Australian decisions, has adopted the contention of the district registrar, namely, that as the system provided by the Act is one of guaranteed title, a certificate of title even though obtained by the registration of a forged transfer constitutes a good root of title, and that the rights of innocent third parties defendant upon it will prevail as against the deprived owner. The result sounds a little startling. It reverses one's ideas of the law of property. The owner has now everything to lose, and the third party everything to gain. Reliance is placed on what is obviously no more than a *dictum* in *Gibbs* v. *Messer*.[16] It is true that in such a case there is usually the assurance fund to fall back on. Curran, J., discusses the question of indemnifying the owner from this source; but, with respect, why should it not be the innocent third party who is to be indemnified? It will be a state of law requiring legislative amendment if owners can be thus deprived of property to which even sentimental considerations and old associations have caused them to become attached; and if lucky strangers are "in the twinkling of an eye" to become the owners of other men's homes.

L. D.

[15] (1915) 31 W. L. R. 583.
[16] [1891] A. C. 248.

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CONTEMPORARY LEGAL REVIEWS AND PERIODICALS.

The Michigan Law Review for June commences with the second and concluding part of Mr. Joseph W. Bingham's learned and elaborate Article on *The Nature and Importance of Legal Possession* of which we noticed the first instalment in our May number. The writer gives his answer to the question—"What do we mean by legal possession? What is the legal *hold* of the land or chattel to which this term refers?" and this is his answer:—

> "Search as we will, we shall find no element or set of elements which is universally present in situations to which this term is applied, and universally absent when legal possession is denied, except those possessory legal rights, etc., which make the term of technical importance. Whenever it is held that legal possession of certain land exists in X, it is held that X has legal rights and liberties in the land of the sort which I have hitherto indicated roughly by the term *possessory rights, etc.* Whenever it is held that Y has not legal possession of certain land, it is held that he has not *possessory rights* of this sort. . . . Adopting this meaning of *legal possession* of land or of a chattel, we can say that X is *legally possessed* of the object whenever we wish to convey the idea that he has legal possessory rights, etc., *presently existing in his favour.* Legal possession of a physical object of property may exist in favour of X by virtue of any of various sorts of titles; and none of these various sorts of titles is determined by linguistic definition or by *a priori* abstract reasoning, but by practical juridical considerations of justice and policy including custom, precedents, *etc., etc.,* such as have produced a large proportion of our law. If this is the nature of legal possession, it in no way offends logic or shocks common understanding to hold and say that X is legally possessed of land which he has never seen and which Y occupies and uses exclusively; to deny to a servant legal possession while giving it to a subservient, unassertive bailee at will; to deny a dominating exclusive lodger legal possession while giving it to a submissive pensionary tenant at will; to give legal possession of unknown minerals to X who denies that he has or claims any right, title, or interest in them, if they should exist; to give even to a disseisor legal possession of a physical object when he has no present physical contact with the object, or physical control over it; for the ques-

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tion is not whether the non-legal facts accord with some preconceived abstract conception, but whether they furnish considerations sufficiently strong when applicable precedents and legislation are thrown into the scales, to induce the Courts to adjudge that the present existence of possessory rights, etc., was in the claimant. We may, perhaps, differ legitimately from decisions of Courts concerning possession in particular cases, but our differences should be based on grounds of practical juridical policy, and not on the ground that some abstract preconceived physical detention conception of possession is irreconcilable with the decision. Viewed in this light, the reason becomes clear why, even when X has occupation of a chattel or of a piece of land and expresses an intent to assert the exclusiveness of his control against everyone, it is necessary to know something of the circumstances and title under which he came into occupation before we can decide conclusively that he has legal possession."

Besides the important sections entitled 'Note and Comment,' and 'Recent Important Decisions,' this number of the Michigan Law Review also contains an Article on *Powers of American Religious Corporations* by Carl Zollmann, and on *Procedural Reform* by Robert McMurdy. In this Article the slow progress of law-reform in Illinois is lamented; and the more rapid improvements of methods and system in the profession of medicine is contrasted.

'All these wonders have been accomplished by our sister profession during this period when we have been playing the part of Rip Van Winkle. We have been too scientific. We have been too much given over to metaphysics. The whole system of common law pleading has been put on the defensive, and some now even dare to doubt the value of technical pleading of any kind. . . . And while we are preparing to adopt radical changes looking toward simplicity and directness, a new principle, suggested by the English Judicature Act, seems destined to blaze the trail, the taking away from the legislatures the power to fix our procedure, and lodging the same in the Courts of last resort, to be there determined by rules adopted from time to time.'

The Yale Law Journal for June commences another excellent number with a long Article of a most lucid, learned, and instructive kind by Mr. William Draper Lewis, of the University of Pennsylvania, upon the *Uniform Partnership Act,*

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by which is meant a draft Act framed with infinite labour, and finally approved, by the 'Conference of Commissioners on Uniform State Laws;' a body the nature and methods of which are explained in the Article. In explaining the leading provisions of this proposed Act, Mr. Lewis has written a most informing disquisition upon the law of partnership, and the uncertainties, and anomalies which exist in it, as, for example, in respect to the obligation of a partner to account for profits derived by him without consent of the other partners from any transaction connected with the conduct of the partnership, or the use of its property,—whether, that is to say, the obligation to account, when the partner has money or other property in his hands, is or is not an obligation in the nature of a trust. Another instance dealt with is the confusion in which the subject of the dissolution and winding-up of a partnership is involved because of the various ways in which the word 'dissolution' is employed. Two important questions, on which, as the writer states, there exists an almost hopeless confusion both in theory and practice, are singled out for special attention, the one concerning the rights of the partner and the separate creditors of a partner in partnership property, and the other, the rights of different classes of creditors where a business has been continued without liquidation by successive partnerships containing one or more common members. Mr. Lewis explains with great ability the confusions and difficulties of the existing law; and shews how the proposed Act deals with the subject, and aims at producing here, and elsewhere in partnership law, certainty, where at present there is uncertainty. We may single out for special mention the fact that the Act provides that partners are to be treated as owners of partnership property holding, not as the law now has it, as 'joint tenants,' but by a special tenancy which it terms 'tenancy in partnership.'

After an Article upon the Jurisdiction of Equity to restrain actions in order to prevent a multiplicity of suits by Mr. R. V. Fletcher, the June number of the *Yale Law Journal* follows with an Article by Mr. Edward C. Eliot, upon *Changing the Constitution* which commences with the arresting words:—

> 'The question of the separation of governmental powers under the United States Constitution is again becoming of pointed interest. The President of the United States to-day exercises a control or influence over legisla-

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tion at Washington far greater than ever before. There is an apparent subordination of Congress in respect of initiative and a tendency to centralise all policies in the White House.'

The writer then examines into the presidential functions under the Constitution, and it will be of interest to those who remember the marked preference for the English system of responsible parliamentary government which Mr. Wilson expresses in his little book on 'Congressional Government,' to read in this Article that—

'The functions of the President are now becoming so extensive that the people are looking to him for all good and ill. No monarch of Europe can pretend to a tithe of his power. . . . It seems that Mr. Wilson is engrafting upon the Constitution, with the acquiescence of the American people, a change which may bring it into closer conformity with the English system of government, with dominant parties and responsible ministries.'

Mr. Eliot, however, comes to the conclusion that—

'While the terms of office of the President and members of Congress are fixed, and neither the President nor his Cabinet have seats in the legislative body, no view of his relation to the country can be sound except that of an executive, non-partisan in action, bound to obey the law and cautious against using the power of the office to coerce legislation. His veto is a quasi-judicial act which should be held free from the prejudices of congressional strife. The government should be one of laws and not of men, by which is not meant that laws have any power to enforce themselves, but that the same men should not make the laws who have the duty to put them into operation.'

He adds—

'The American people should at least be made aware of the impending change and not enter into it unadvisedly; and they should appreciate the real bearing of the Constitution upon it.'

Bench and Bar for May, besides lesser matters, contains a long and careful Article by L. C. Whiton upon the law governing *The Stockbroker and his Customer.* In the *Bench and Bar* for June we notice with special interest an Article on the *Elimination of Useless Law Reports.* As the writer very truly says:—

'When reporting was in its infancy, nearly every decision was potentially useful as a precedent. To-day the cases to be reported should be selected by a careful and discriminating process of elimination.'

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We note that the legislature of the State of New York, at its recent session, passed a Bill which has for its purpose the discovery of a remedy for the evils flowing from the over-production of law reports. It provides for the creation of a commission, composed of twelve members of the Bar, 'for the purpose of proposing to the legislature, at the next session thereof, a plan for reducing the accumulation of law reports by restricting their authority as precedents, or otherwise, for improving or superseding the existing system of reporting opinions of the Courts and thereby expediting the whole course of judicial procedure.' 'The Bill was vetoed by the Governor, but it may have pointed out a way whereby the constantly growing evil referred to may be seriously considered and ultimately reduced. It will be seen that the Bill proposed, not only to limit the number of decisions which should be reported hereafter, but to restrict the number of previously reported decisions which might be regarded as precedents.

We have before us the *Law Journal* for May 22nd, and 29th, and for June 5th. The first remarks that if Sir Edward Speyer had consulted his legal adviser before attempting to resign his baronetcy he would doubtless have been told that the action he proposed is not open to him by the Common law of England. A baronetcy, like a peerage, is a title of honour, or, in legal terminology, a 'dignity,' and the common law has decreed that 'dignities' cannot be renounced. It is granted to a man and 'the heirs of his body.' in tail. He cannot deprive his heirs of their rightful inheritance, either by disposing of the dignity by his will, or even by surrendering it to the Crown. The *Law Journal* for May 29th regrets that the great gifts of Sir John Simon--'his strong and penetrating intellect, his remarkable powers of lucid statement, and his engaging and dignified personality'—are to be lost to the legal world, in which in the supreme position of Lord Chancellor, they would have been of the utmost service. Apart from this they cordially welcome the promotion of Sir Stanley Buckmaster to the highest judicial position in the land. The *Law Journal* for June 5th, contains an Article upon a subject very present to British minds at the present time—*Reparation for War Crimes*. It asks the question 'how is the responsibility of the State, whether original or secondary, for breaches of the laws of war brought

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home to it? Or, to put the question in a slightly different way, what is the sanction of the laws of war?' and answers it in the following manner:—

> 'In the first place, there is no doubt that, even apart from the Hague Convention, there is primarily a duty upon the higher command of any land army to ensure and enforce upon its members the observance of the laws of war. . . . If a belligerent is satisfied that the breaches of the rules of warfare have the approval of the enemy State itself, he may at once resort to reprisals, without the lodging of a previous complaint. If the wrongful acts appear to be isolated and unauthorised, he has the concurrent remedy of punishing the offender if caught. Thus a soldier or officer responsible for killing or ill-treating prisoners, or pillaging, or firing on the Red Cross, or abusing the White Flag, may be taken and punished. On the question of reparation, however, for such offences, the Fourth Hague Convention of 1907 on Land Warfare (Article 3) introduced a striking innovation. . . . Article 3 (introduced by the German Delegation at the Hague) stipulated that a belligerent was to be held (a) responsible for all wrongful acts committed by members of its armed forces, and (b) liable to pay an indemnity. Therefore, a matter arising out of the war may well be raised after the conclusion of peace at a tribunal such as the Hague Court of Permanent Arbitration. . . . It is to be noted that the Article expressly states that the violations for which responsibility is to be accepted and indemnity paid are violations of the Fourth Convention; so that the question will arise, for this as well as for more general reasons, of the binding force of the Conventions in a war in which not all the belligerents (i.e., Turkey, Servia, and Montenegro) are contracting parties. . . . Failing the operative effect of this Article and the 'consequent submission of such claims to the Court of Arbitration, clauses could doubtless be inserted in the peace treaty reserving their consideration for a specially elected tribunal constituted according to the agreement of the Powers. But on general principles there should be no difficulty in maintaining the right to reparation for offences against the law of nations under International Law as it stands.'

Space does not permit us to do more in this issue than acknowledge with thanks the receipt of The Scots Law Times of May 22nd, and 29th, and June 5th, and 12th; and of further issues of the various legal periodicals and reports from British India which we enumerated in our last issue.

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We notice that the Madras Law Times of April 6th pays Mr. Justice Lennox the compliment of reproducing his address on Bench and Bar delivered to the last meeting of the Ontario Bar Association.

A. H. F. L.

The Illinois Law Review contains a short article by William Jennings Bryan entitled *Neutrality—A Few Principles,* which we reproduce in full:—

"In these days, when it is so necessary that our nation shall live up to the highest and most exacting requirements of neutrality, it may be well to submit for consideration a few principles, which can be easily understood and readily applied.

"First. It is not to be expected that belligerents on either side will be pleased with absolute neutrality, since no man can act as an impartial judge in his own case.

"Each belligerent is biased in its own behalf, and is naturally disposed to look upon acts of a neutral nation, not according to the abstract theories involved, but according to the effect which the action has. The best evidence that our country is maintaining neutrality is found in the fact that active sympathizers with both sides complain.

"Second. In changing a rule of conduct during the course of a war, it is necessary to consider the effect of the change upon the belligerents as well as the abstract question involved. A nation which desires to be neutral is not at liberty to make a change which materially aids one side or injures the other side, even though such a change might be desirable in time of peace.

"Third. No change in rules with respect to dealings with belligerents can be regarded as in keeping with neutrality if the reason for the change is found in the benefit it would confer upon, or injury it would do to, either side, and anyone favouring a change can test himself by asking whether he would be equally anxious for it if the positions of the belligerents were reversed.

"It is the duty of this nation to be neutral, and it is the duty of its citizens to assist the government. Those who become partisans and resort to denunciation excite denunciation in return, putting their interest in a belligerent above their interest in their own country. This not only embarrasses their Government in its effort to maintain neutrality,

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but tends to lessen the influence of our nation as a friend of the contending nations when the war is over."

Mr. Charles Cheney Hyde has a paper on *Consular Rights in Relation to the Estates of Deceased Countrymen*, and discusses the rule of International Law, amplified by treaty, which confers upon the Consular officers extensive privileges on the death of a fellow countryman. These embrace notification of the Consul by local authorities of the fact of death; the taking charge of or placing the consular seal upon the assets of the deceased pending the appointment of an administrator; the administration of the estate of the decedent; and the distribution to foreign heirs in the State to which the consul belongs, either of assets of the estate, or of pecuniary benefits due them by reason of their connection with or dependence upon the decedent. These privileges are of great importance to foreign consuls in the United States, and particularly to those within whose consular districts reside large numbers of their fellow countrymen, engaged in industrial occupations in the course of which death is frequently encountered. The United States is bound by numerous conventions with other States providing that in the case of death of a citizen of either contracting party within territory belonging to the other, the local authorities shall give notice of the fact to the consular representative of the Nation of the deceased; but the absence of local laws due in part to the hostility of the various States to interference from Washington, and the general failure of the several States to heed requests from the Department of State, has served in effect to leave the international obligation largely unfulfilled, and to suggest the importance, if not the necessity, of a federal law making uniform and adequate provisions to carry out the undertaking of the Nation.

The rest of the review is concerned with matters of interest more to Illinois and American readers than to members of the various Canadian Bars. Mr. O. N. Carter writes on *Early Courts of Cook County.*

Mr. John B. Sanborn writes on *Jurisdiction and Venue in Federal Courts;* and Mr. Robert J. Cary on *Evolution of Railroad Administration.*

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The Columbia Law Review for June contains the concluding portion of Mr. Edwin C. Goddard's Article on the *Liability of the Common Carrier as Determined by Recent Decisions of the United States Supreme Court.* He treats of the effect of the Carmack Amendment to the Hepburn Act and the various cases on this Statute. The effect of the decisions upon the Hepburn Act is to extend the liability of the initial carrier; to secure on Interstate shipments uniformity; and to prevent discrimination. The learned writer is of the opinion that a more satisfactory relation between shipper and carrier than that existing at present would result from a voluntary assumption by all the great carriers of a liability as full assurers against every hazard except the act of the shipper, at the lowest insurance cost consistent with a reasonable profit to the carrier from its insurance business.

Mr. Edwin C. Abbott, Jr., contributes a paper on *Fraud as a Defence at Law in the Federal Courts.* Commencing with the principle that an equitable defence cannot be maintained in the Federal Courts in an action at law the question arises how far is fraud available as a legal defence in the Federal Courts. He divides the cases into those decided in the Supreme Court, and those decided in the inferior Federal Courts. There are two lines of authority in the Supreme Court, the first given by the rule found in *George* v. *Tate*,[1] and the second by the rule of *Union Pacific Railway* v. *Harris*.[2] The cases in inferior Federal Courts may be divided into three groups, the first of which follows *Union Pacific* v. *Harris* in holding that fraud in execution is available as a defence at law whether the instrument be sealed or unsealed. The second group contains those cases which follow *George* v. *Tate* and hold that fraud in inducement is not available as a defence at law where the instrument is under seal. In the author's third group are collected those cases which discuss the question whether fraud in inducement is a defence at law to instruments or agreements not under seal. It may be noted that after this Article was written Congress by an Act approved the 3rd March, 1915, has made an important step in advance by permitting equitable defences to be set up by answer, plea or replication in a suit at law in the Federal Courts.

[1] (1880) 102 U. S. 564.
[2] (1895) 158 U. S. 326.

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Mr. J. G. Pease of London, England, writes on the *English Workman's Remedies for Injuries Received in the Course of his Employment, at Common Law and by Statute.* The article is a clear historical discussion of the various rules which have prevailed in England whether at common law or by Statute, and the most recent cases on the existing Act are grouped. The leading cases on the question as to what is an "accident" are *Fenton* v. *Thorley,*[3] and *Trim Joint District School* v. *Kelly.*[4] In the case first mentioned Lord Macnaghten defined "accident as used in the Act," "in the ordinary and popular sense of the word as denoting an unlooked for mishap or an untoward event which is not expected or designed;" and this definition has been generally accepted. Hence injury by accident may include mishap caused by the negligence of the injured man as well as those for which no one is responsible. So in *Fenton* v. *Thorley* an injury arising from an effort voluntarily made to remedy a defective machine was held to be an injury by accident. An injury intentionally inflicted on himself would, of course, not be an accident at all; it would be an event which was expected or designed. Suppose, however, the injury is designedly caused by some person other than the injured man. From the point of view of the sufferer it may be accidental. In *Nisbet* v. *Rayne and Burn,*[5] the Court of Appeal held that a cashier who was murdered by a robber had died from "injury by accident," although his death was clearly premeditated and intended by the murderer. This case was affirmed in principle in the *Trim Joint District School Case,* where the House of Lords, by a majority, held that the death of a master of an industrial school caused by deliberate and intentional violence on the part of two inmates of the school was "an accident." Lord Haldane points out that when Lord Macnaghten spoke of a mishap being "not designed" he meant not designed by the sufferer. A man ceases to be in the course of his employment if he ceases to do his work and does something entirely for his own benefit, even during working hours and on his employer's premises. But if in an emergency he goes outside his proper work, and to protect his master's interest does something quite outside the scope of his employment, he may, nevertheless, still be acting in the course of his employment. The best cases on these points are *Sharp* v. *John-*

[3] [1903] A. C. 443.
[4] [1904] A. C. 667.
[5] [1910] 2 K. B. 689.

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son & Co. Ltd.;[6] *Cremins* v. *Guest, Keen & Nettlefords Ltd.*;[7] *Rees* v. *Thomas*;[8] *Reed* v. *Great Western*;[9] *Low* v. *General Steam Fishing Co. Ltd.*;[10] *Moore* v. *Manchester Liners Ltd.*[11]

In the Harvard Law Review for June Mr. Austin W. Scott writes on *Liabilities Incurred in the Administration of Trusts.* The Article is a good chapter, well written, on settled principles of the law of trusts. It is well settled that in the absence of an expressed stipulation relieving him from liability a trustee is personally liable on contracts made by him for the benefit of the trust estate; he is similarly liable for torts committed in the course of the administration of the trust; and in the absence of statutory provisions he is liable for taxes. When he has discharged a liability incurred in the due course of administration of the trust he has ordinarily a right to be reimbursed; but if the trust estate is insufficient to reimburse the trustee, may he obtain reimbursement from the *cestui que trust* personally? In a number of cases it has been held that he may. When the settlor is himself a *Cestui que trust* a contract to reimburse the trustee may be spelled out; but the decisions have gone further and have allowed the trustee reimbursement from the *cestui que trust* personally, even where the latter is not the settlor, and where it would be impossible to spell out any contract. In *Hardoon* v. *Belilios*,[12] a firm of stock brokers placed certain shares, not fully paid, in the name of the plaintiff, their employee. The brokers subsequently assigned their beneficial interest in the stock to a syndicate which transferred this interest to the defendant. The Plaintiff requested the defendant to take the shares out of the Plaintiff's name, but the defendant refused. The corporation became insolvent and the plaintiff was compelled to pay several calls on the stock, and brought suit against the defendant to recover the sums he had thus been obliged to pay. The trial Court non-suited the plaintiff. It was held by the Judicial Committee of the Privy Council that the non-suit was improper. The Court said "The plainest principles of justice require that the

[6] [1905] 2 K. B. 139.
[7] [1908] 1 K. B. 469.
[8] [1899] 1 Q. B. 1015.
[9] [1909] A. C. 31.
[10] [1909] A. C. 523.
[11] [1909] 1 K. B. 417.
[12] [1901] A. C. 118.

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cestui que trust who gets all the benefit of the property should bear its burdens unless he can shew some good reason why his trustee should bear them himself." The trustee, however, has a better right than that of reimbursement. He has a right of exoneration; a right not to be compelled to discharge a liability out of his own estate. See *In re Blundell.*[13] The right of the trustee to exoneration cannot be reached by the personal creditors of the trustee. *In re Richardson,*[14] is a valuable case on this point. From this it appears that the asset of the trustee is not a right to receive money which the creditors of a bankrupt trustee could claim; it is a right to be saved harmless, that is to be exonerated by having his liability discharged. Nothing is better settled than that the trustee is not an agent of a *cestui que trust.* What is the right then of the creditor who cannot sue the *cestui que trust?* He may sue the trustee at law and obtain a judgment against him personally and levy on his individual property. But he cannot, any more than an individual creditor of the trustee, levy on the trust estate. *Jennings* v. *Mather.*[15] Can the creditor ever, except through the trustee's right of exoneration, reach the trust estate by a suit in equity? If the trustee properly creates a mortgage or pledge of the trust estate undoubtedly the creditor may enforce it. But if no mortgage or pledge is created, and if the trustee signs the contract "T, Trustee" or "T, as Trustee for the X estate" he is held personally liable, the words shewing his trusteeship being treated merely as *descriptio personæ* and the trust estate is not liable. But if he signs "as trustee but not individually," or "as trustee but not otherwise" the American rule is that he is not personally liable. *Thayer* v. *Wendell.*[16] In a recent English case it was said that if he is not bound, no one is bound, and it was held therefore, that the provision that the trustee should not be personally liable was repugnant and void; *Watling* v. *Lewis*;[17] but this view was later disapproved in *Re Robinson's Settlement.*[18] When, however, the trustee makes a contract for the benefit of the trust estate whereby he does not purport to bind the trust estate, but binds himself, has the creditor any right

[13] (1888) 40 Ch. D. 370.
[14] [1911] 2 K. B. 705.
[15] [1902] 1 K. B. 1.
[16] (1912) 1 Gall. (U. S.) 37.
[17] [1911] 1 Ch. 414.
[18] [1912] 1 Ch. 717, 728. See, also, 133 L. T. 250.

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against the trust estate except through the trustee? In general it is clear that the trust estate is not liable for the contracts: *Farhall* v. *Farhall*,[19] or torts: *Moniot* v. *Jackson*,[20] of the trustee although made or committed in the due course of the administration of the trust. But it is held in a few States that if the debt be properly incurred by the trustee and the estate enriched thereby the creditor may recover against the estate to the extent of the enrichment. In England, however, a direct right against the estate, based on the prevention of unjust enrichment, is denied: *In re Johnson*;[21] *In re Evans*;[22] *In re British Power Co.*;[23] *In re Morris*;[24] and the creditor's right against the trust estate is dependent on and limited to the extent of the trustee's right to exoneration, and it is necessary in every case to go into the trustee's account to ascertain whether he has a right of exoneration, except in the cases where the trustee has expressly mortgaged or pledged or has expressly charged the trust estate.

Mr. Bruce Wyman has a paper on *Separation of Interstate and Intrastate Accounts in Federal and State Regulation of Rates;* and Mr. Judson A. Craig contributes a careful criticism of a much-discussed piece of legislation, "*The Uniform Partnership Act—a Criticism.*"

The Law Times for May 15, May 22, May 29 and June 5 contains articles entitled "*Trusts and the War;*" "*Companies and Alien Enemies;*" "*War and Discharge of Contracts*" and "*The Amenity of Privacy.*"

The Solicitors Journal and Weekly Reporter for May 22, 29 and June 5 contains articles on *The War and the Discharge of Contracts* and a general criticism of some of the points raised by Mr. J. L. Thorndike in his Article on the *Remoteness of General Powers* in the May number of Harvard Law Review noted *supra,* page 544.

The American Law Review for May and June contains the following articles: *The Transfer of Merchant Vessels from Belligerent to Neutral Flags* by James W. Garner; *The*

[19] (1871) L. R. 7 Ch. 123.
[20] (1903) 40 N. Y. Misc. 197, 81 N. Y. Supp. 688.
[21] (1880) 15 Ch. D. 548.
[22] (1887) 34 Ch. D. 597.
[23] [1910] 2 Ch. 470.
[24] (1889) 23 L. R. Ir. 336.

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Value and Place of Roman Law in the Technical Curriculum by Charles Sumner Lobingier; *Law and Public Opinion* by Mr. Noble C. Butler; *The Constitutionality of "Blue Sky" Laws* by Mr. R. S. Spillman and the *Danbery Hatters' Case—Its possible effect on Labour Unions* by Mr. Theodore Megaarden.

L. D.

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NEW BOOKS AND NEW EDITIONS.

The Law of Copyright in Works of Literature, Art, Architecture, Photography, Music and the Drama; including chapters on Mechanical Contrivances and Cinematographs; together with International and Foreign Copyright, with the Statutes relating thereto. By the late Walter Arthur Copinger, F.S.A., LL.D., of the Middle Temple, Esq., Barrister-at-Law, author of "Index to Precedents in Conveyancing;" "A Treatise on the Custody and Production of Title-deeds;" "Tables of Stamp Duties," etc. Fifth edition by J. M. Easton, of the Inner Temple, Esq., Barrister-at-Law, author of "The Law as to the Appointment of New Trustees," "The Law of Rent-charges." Compiler of "The Quarterly Noter-up." London: Stevens and Haynes, Law Publishers, Bell Yard, Temple Bar, 1915.

A new edition of a text-book so well and favourably known, as "Copinger's Law of Copyright," needs only to be announced and can dispense with any special recommendation. The editor explains in his preface that owing to the provisions of the Copyright Act, 1911, he has been forced to rewrite practically the whole of the work. He adds however, that the law as to copyright in designs has for many years past parted company with the law as to copyright in literature and artistic works and—after consulting with the publishers—he decided to omit the portion of the work relating to copyright in designs from the present edition. The book has grown in size considerably.

Illustrations in Advocacy with an Analysis of the Speeches of Mr. Hawkins, Q.C. (Lord Brampton), in the Tichborne Prosecution for Perjury (A Study in Advocacy). Also a Prefatory Letter from the Right Hon. Lord Brampton. By Richard Harris, K.C., a bencher of the Middle Temple. Fifth edition with Foreword and Remarks on "The Study in Advocacy," by George Elliott, K.C., of the Inner Temple and South-Eastern Circuit. London: Stevens & Haynes, Law Publishers, Bell Yard, Temple Bar, 1915.

The reappearance of this book in a new edition and a reperusal of its most amusing pages, has been a real pleasure to the reviewer. We can imagine no book which deserves more to be recommended to budding Ciceros. In the first place it will shew them that advocacy worthy of the name is a very real art; and especially it will inform them of the dangers that accompany the cross-examination of witnesses. They will find their medicine however, dealt out to them in the very

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nicest kind of jam. What will give the book a continued existence for an indefinite period is the account of the famous Tichborne trial, and the analysis of the opening speech and reply of Sir Henry Hawkins, as he then was, Counsel for the Crown.

Those who are old enough, unhappily, to remember the Tichborne trial, which has had no parallel in the history of English trials, will meet again with pleasure Mr. Bogle's "very punctual flea."

Report of the Thirty-seventh Annual Meeting of the American Bar Association, held at Washington, D.C., October 20th, 21st, 24th, 1914. Baltimore: The Lord Baltimore Press.

We have received the above volume, and also the number of the American Bar Association Journal for April, 1915. It is, of course, impossible to do anything like justice here to the value and interest of their contents. The first, after certain formal reports and proceedings, contains the opening address of the President, the Hon. W. H. Taft, in all of whose pronouncements Toronto must now feel a special interest. After some remarks upon the altered aspect of the world since the last meeting when Lord Haldane dwelt upon the effect of what he called 'sittlichkeit,' or 'good form,' between groups of nations as a growing influence in favour of peace, Mr. Taft proceeds to consider and comment upon "the most noteworthy national legislation of the year, from the standpoint of the administration of justice," namely, that contained in the Trade Commission Act and the so-called Clayton Act. These Acts together affect two general subject-matters. They supplement existing statutes and the general law as to illegal trusts and monopolies in interstate commerce, and they deal with the application of the anti-trust Act to labour associations, the issuing of injunctions in labour disputes in federal Courts, and the procedure for the punishment of contempts in a certain class of cases. Mr. Taft discusses these matters in an incisive and courageous way. We have only space for one typical extract:

> "The great political power that labour combinations are believed to exercise has enabled them successfully to press upon legislatures the idea that they are politically a privileged class, that the interest of the community lies in making them so, and that their cause is so important that the

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ordinary means of enforcing the law against their violations of it should be weakened rather than strengthened. To yield to this view it seems to me is unwise. Between the machinations of the lawless manipulator of capital and the aggressions of the lawless leader or agents of combined labour, there is a forgotten man, sometimes described as the 'public,' for whom government and society chiefly exist, who in the clashes between capital and labour finds himself ground between the upper and the nether millstone."

Following this Presidential Address, are addresses by Mr. Elihu Root, also much honoured in Canada, upon 'The Layman's Criticism of the Lawyer;' by Chief Justice Sir Charles Fitzpatrick, upon 'The Constitution of Canada;' and by Mr. Romulo S. Naon, the Argentine Ambassador to the United States, upon 'Argentine Constitutional Ideas.' From the first we cannot resist quoting the following admirable passage:—

"American procedure ought to follow as closely as possible the methods of thought and action of American farmers and business men and workmen. The law is made not for lawyers but for their clients, and it ought to be administered, so far as possible, along the lines of laymen's understanding and mental processes. The best practice comes the nearest to what happens when two men agree to take a neighbour's decision in a dispute, and go to him and tell their stories and accept his judgment. Of course all practice cannot be as simple as that; but that is the standard to which we ought to try to conform to rather than the methods of an acute, subtle, logical, finely discriminating, highly trained mind. It is that sort of thing which merchants seek when they get up committees of arbitration to decide their controversies without the intervention of lawyers. They are trying to get their questions settled in accordance with their instincts and habits of thought."

The views of a man in the position and with the inside knowledge of Sir Charles Fitzpatrick upon such subjects as the real constitutional position of the Governor-General today, the right of appeal to the Judicial Committee of the Privy Council, and, generally, the relations of this Dominion to Great Britain are of very special interest. We have them in his Address in the volume under Review upon 'The Con-

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stitution of Canada,' in which he outlines our constitutional history up to the present time when—

> "There is now in Canada a people, if not entirely homogeneous, yet living in complete harmony, having all sectional and religious animosities buried in oblivion, and all loyally united in an effort to build upon this continent a great Colonial Empire under the ægis of the British flag."

As to the right of appeal to the Privy Council the Chief Justice says—and we would call Lord Haldane's attention to it,—

> "The result of retaining this judicial tribunal has proved so eminently satisfactory that, were the opportunity afforded to-day, I do not believe the people of Canada would desire any amendment of their Constitution in this regard . . . Since 1867 the Judicial Committee has been called upon in scores of cases to trace out the line of demarkation between federal and provincial jurisdiction and it must be truthfully said that the result has been eminently satisfactory. Removed, as the majority of the judges are, from all local strife, desirous as they are to distribute the most impartial justice, it is not surprising that the right of appeal to the King in His Privy Council is one of the privileges most highly prized by the people of the Dominion."

As to the Governor-General he declares that he is by no means, as many think, "a mere signing machine."

> "There is no doubt that the office of the Governor-General has been greatly shorn of the power which it once had; nevertheless, where the Governor enjoys the confidence of his Ministers, his influence is still very great, not so much, however, through the exercise of the functions of his office, as in the confidence which he inspires in giving his advice. . . . The Governor-General . . . is a living tie which indicates the fact that Canada is a Dominion of His Majesty the King, and by force of his personal influence and in view of the fact that from his antecedents he is outside the field of party prejudices and animosities, he is able to exercise a quiet, and though unperceived by the public, an all-important influence upon the actions of his Ministers."

Finally—

> "England first taught the world that the divine right of ruling is not vested in kings and princes, but in the

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people, expressed through their chosen representatives in Parliament assembled. We glory in her literature and her laws, in her poets, historians, artists, and statesmen. . . Without disparagement or offensive criticism of any nation, we, as Canadians, viewing ourselves as an integral part of the British Empire, are proud to declare our citizenship in the great Mother of Nations, in that nation, which, to keep its sacred covenants, to maintain its plighted word, is ready to pour out its treasures and sacrifice the lives of the best and bravest of its children."

We much regret that want of space prevents us noticing further the wealth of interest and learning contained in the Committee Reports, Addresses, Notes, and other proceedings contained in the volumes under review, especially the contributions of the Bureau of Comparative Law. If future issues of the Journal reach us, we shall hope to be able to notice their contents in more detail.

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THE GAZETTES.

The Manitoba Gazette of June 5th, 1915, contains the further prorogation of the Legislative Assembly from June 10th, to July 15th.

The Saskatchewan Gazette of May 31st, 1915, contains new regulations, under sec. 4 of ch. 11, of the Statutes of 1910-11, governing theatres, public halls, film exchanges and moving picture machines.

The British Columbia Gazette of May 27th, 1915, contains a provincial Order in Council extending the boundaries of the City of North Vancouver. Also a Dominion Order in Council of April 24th, 1915, prohibiting any person within any Dominion Park, trafficking in, or engaging in the business of buying and selling rifles, shotguns, revolvers, or any other firearms. Also a Dominion Order in Council of April 30th, 1915, regulating the removal of timber in Dominion Parks.

The British Columbia Gazette of June 10th, 1915, contains a Notice by the provincial Attorney-General that during the war no probate of a will or letter of administration of the estate of any German, Austro-Hungarian, or Turkish subject wherever resident will be granted in respect of any assets in the province without the express license of the Crown.

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LOCALS AND PERSONALS.

Harrison Arrell, of the firm of Arrell and Arrell, has been appointed County Crown Attorney and Clerk of the Peace of the County of Haldimand.

J. S. Rankin, of the firm of Black, Hilliar, and Rankin, of Weyburn, Sask., has been appointed to a captaincy in the 46th Battalion, Canadian Expeditionary Force.

John R. Armstrong, K.C., of St. John, N.B., has been appointed judge of the County Court for St. John City and County, succeeding His Honour Judge Forbes retired.

Mayor C. J. Lennox, of the firm of Broatch, Lennox, Muir, and Haig, of Moose Jaw, Sask., has been appointed junior major in the 46th Battalion, Canadian Expeditionary Force.

Mr. A. M. Greig, of Almonte, has been appointed junior judge of the County of Bruce.

His Honour Judge A. B. Klein, late junior judge, has succeeded the late Judge Barrett, as judge of the County Court of Bruce.

Mr. Edward T. C. Knowles has been appointed Probate Judge of St. John, New Brunswick.

Mr. John Thompson, K.C., of Ottawa, a son of the late Sir John Thompson, has accepted the position of Government counsel to assist Sir Charles Davidson in the war contracts investigation. He has, however, we understand, stipulated that the position is to be an honorary one, refusing to accept any fee.

We have to note with regret the following deaths among judges and members of the profession:—

Augustin Cyrille Papineau, retired Justice of the Superior Court, Que., on May 27th, at Outremont.

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Simeon Beaudin, Justice of the Superior Court, Que., on June 4th, at his summer home at Pointe Claire.

Alexander Finkle, for more than 29 years County Judge of the County of Oxford, Ont., on May 26th, at Woodstock.

Samuel Willard Foster, formerly District Magistrate and judge of the Sessions for the District of Bedford, Que., on May 30th, 1915, at Knowlton, Que.

Captain Ronald Hoskins, of Winnipeg, killed in action at battle of St. Julien.

Captain Ernest M'Means, of Winnipeg, killed in action.

Lieutenant Albert N. Morgan, of New Liskeard, Ont., killed in action.

H. E. Ridley, of Vancouver (Ridley, Macrae and Tobin), on June 6th, 1915, at Vancouver.

Charles H. Connor, City Solicitor for St. Catharines, on June 11th, 1915, at St. Catharines, Ont.

Lieut.-Colonel Romuald Delfausse, K.C. (Lavallee, Delfausse, Desmarais, and Deserres), on June 19th, 1915, at Montreal, Que.

W. A. Lyons (Lyons, Mooney, and Lyons), of Halifax, on May 30th, 1915, at Halifax, N.S.

Henry E. Ridley (Ridley, Macrae, and Tobin), of Vancouver, B.C., on June 7th, 1915, at Vancouver.

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The Canadian Law Times.

VOL. XXXV. AUGUST, 1915. No. 8.

BY THE WAY.

In our issues of March and April last we had the honour of publishing the names of those Ontario lawyers and law students who are on active service, to which we have now to add the name of Mr. Arthur B. Colville of Toronto. In June we published the names of those from Nova Scotia, New Brunswick, Alberta, and Saskatchewan. We are now able to add those from Manitoba. In every case we have taken great pains to make the list accurate and complete. We shall be very grateful to those who will call our attention to any mistakes or omissions.

The doctrine of heredity is writ large in legal places in England. Lord Justice Phillimore, Mr. Justice Coleridge, Mr. Justice Lush, and Mr. Justice Bargrave Deane are the sons of Judges. It could not, however, be said of any of them, as was said of the occupants of one Court, that they succeeded to their places *per stirpes* and not *per capita.*

On July 14th last the following announcement issued from 10 Downing Street:—

> 'By the invitation of the Prime Minister, Sir Robert Borden, the Prime Minister of the Dominion of Canada, attended the meeting of the Cabinet to-day.'

This, it is believed, is the first occasion on which the Prime Minister of one of the Dominions has taken part in an ordinary meeting of 'His Majesty's Servants,' though some of them have been invited on different occasions to attend the Committee of Imperial Defence. It is well to note these

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advances towards formal Imperial unity as they occur. It is the substantial and real union, however, which is all important.

We have the pleasure of giving our readers in the present issue a lucid and informing contribution by the Dean of the Law Faculty at McGill upon the Theory of Sovereignty. That theory, as found in its most extreme and definite form in John Austin's 'Province of Jurisprudence Determined,' is that there is in every independent political community some single person, or some combination of persons, which has the power of compelling the other members of the community to do exactly as it pleases. Professor Lee shews what the genesis of this theory is, and wherein the fallacy of it lies, and compares it with the genesis of the Social Contract theory. He seems to arrive at much the same conclusion as Professor Jethro Brown in his 'Austinian Theory of Law,' namely, that we must think of the State 'as a unity, a personality, a sovereign,—a sovereign in whose presence the visible ruler can aspire to no higher title than that of sovereign-organ. The law may accept the declared will of that visible ruler as conclusive of the will of the sovereign, but the fact need not prevent us from recognizing, even as lawyers, that the visible ruler is but an organ of the organized community.' As John Stuart Mill put it, government is always either in the hands, or passing into the hands, of whatever is the strongest power in society, and what this power is, and shall be, depends less on institutions, than institutions depend upon it.

The lawyer who is "nothing but a mechanic, a mere working mason," to use an expression of Counsellor Pleydell in Scott's Guy Mannering, may despise such speculations as that on 'Sovereignty' dealt with by Professor Lee in our present issue. He may regard them as not "practical," meaning that as he looks at it, "there is no money in them." The fact remains, nevertheless, that the pursuit of these enquiries into the region of abstractions which surrounds the field of practical law, by reason of the concentration of thought, and the exercise of the logical faculty, which they involve, conduces to the highest order of legal ability. For the same reasons it has been said that the study of metaphysics is the best possible training for a lawyer. Such

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enquiries, however, as those into the Theory of Sovereignty, the nature and origin of law, and the evolution of morals, have this advantage over metaphysics, that they bring the student into closer proximity to the actual field of law proper.

In speaking of Mr. Asquith in his 'Ordeal by Battle,' which everybody is reading, or ought to read, Mr. Oliver has some remarks about lawyers which are interesting and afford food for thought. After observing that in "that golden age" between the passing of the Reform Bill and the founding of the Eighty Club (1832-1880) "it was all but unthinkable that a practising barrister should ever have become Prime Minister," Mr. Oliver continues:

> "The legal profession at this time had but little influence in counsel; still less in Parliament and on the platform. The middle classes were every whit as jealous and distrustful of the intervention of the lawyer-advocate in public affairs as the landed gentry themselves. . . . A representative assembly which entirely lacked lawyers would be impoverished; but one in which they are the predominant, or even a very important element, is usually in its decline. It is strange that an order of men, who in their private and professional capacities are so admirable, should nevertheless produce baleful effects when they come to play too great a part in public affairs. Trusty friends, delightful companions, stricter perhaps than any other civil profession in all rules of honour, they are none the less, without seeking to be so, the worst enemies of representative institutions. The peculiar danger of personal monarchy is that it so easily submits to draw its inspiration from an adulatory priesthood, and the peculiar danger of that modern form of constitutional government which we call democracy, is that lawyers, with the most patriotic intentions, are so apt to undo it. Lawyers see too much of life in one way, too little in another, to make them safe guides in practical matters. Their experience of human affairs is made up of an infinite number of scraps cut out of other people's lives. They learn and do hardly anything except through intermediaries. . . . Plausibility, an alert eye for the technical trip or fall—the great qualities of an advocate—do not necessarily imply judgment of the most valuable sort outside Courts of law. . . . And the misfortune is that in politics, which under its modern aspect is a trade very much akin to advocacy, there is a temptation,

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with all but the most patriotic lawyers, to turn to account at Westminster the skill which they have so laboriously acquired in the Temple. Of course there have been, and will ever be, exceptions. Alexander Hamilton was a lawyer, though he was a soldier in the first instance. Abraham Lincoln was a lawyer. But we should have to go back to the 'glorious revolution' of 1688 before we could find a parallel to either of these two in our own history. Until the last two decades England has never looked favourably on lawyer leaders. This was regarded by some as a national peculiarity; by others as a safeguard of our institutions. But by the beginning of the twentieth century it was clear that lawyers had succeeded in establishing their predominance in the higher walks of English politics, as thoroughly as they had already done wherever parliamentary government exists throughout the world. During this epoch, when everything was sacrificed to perspicuity and the avoidance of boredom, Mr. Asquith's utterances led the fashion. His Ministry was composed to a large extent of politicians bred in the same profession and proficient in the same arts as himself; but he towered above them all, the supreme type of the lawyer-statesman."

In the *Canada Law Journal* for July, Mr. Labatt revives the recent controversy arising out of the case of *The Royal Bank* v. *The King*, as to the scope of our provincial power to legislate in relation to 'civil rights in the province.' We would suggest that the controversy might now be allowed to sleep until the construction of that power again comes up before the Courts. Mr. Labatt, however, reiterates and enlarges upon his contention that the power must be construed by reference to what he calls "the general principle of private international law," that "the locality of a debt is at the domicile of the creditor." It seems somewhat startling that the gift of a broad legislative power in a constitutional statute is to be restricted in its scope by some supposed rule of private international law. We, however, find no such general rule of private international law, as that "the locality of a debt is at the domicile of the creditor." So far as the determination of jurisdiction to grant letters of probate and administration is concerned, the rule is quite the other way. As Mr. Dicey says in his *Conflict of Laws* (2nd ed., p. 310) the general maxim is that 'debts, choses in action, and claims of any kind must be held situate where *the debtor or other*

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person against whom a claim exists resides.' Mr. Labatt seems to be thinking of the maxim *Mobilia sequuntur personam,* but the Privy Council in the recent case of *Rex* v. *Lovitt* (1912), explained that this maxim is simply the expression of a general English rule of construction of statutes relating to legacy and succession duties, namely, that the duties are intended to be imposed only on those who become entitled by virtue of English law. Mr. Labatt cites *Wharton's Conflict of Laws* (3rd ed., p. 171, 80c), but when we look that up all we find is that—'The *situs* of a debt *for the purposes of taxation* is, in general, at the domicil of the creditor, and not at the domicil of the debtor.' With all respect to Mr. Labatt we must continue to hold the view, subject to the proper understanding of the Privy Council decision in *Royal Bank* v. *The King,* that a civil right in the province, to which the British North America Act refers, is nothing more or less than a right to invoke and set in operation the machinery of the civil Courts in that province, directly or indirectly, to gain some debt, or recover some advantage, or restrain some one who is endeavouring to do so; and that, subject of course to the powers of the Dominion parliament, the provincial legislature has exclusive authority to legislate in relation to such civil rights.

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LIST OF BARRISTERS, SOLICITORS, AND STUDENTS-AT-LAW NOW ON ACTIVE SERVICE FROM THE PROVINCE OF MANITOBA.

Adamson, H., Andrews, A. H. J., Anderson, A. J., Bell, J. K., Bird, R. deB. M., Black, J. R., Blackwood, H. P., Blake, C., Brayfield, H. C. H., Brown, R. R. J., Campbell, H. R., Cameron, D. I., Carey, L. J., Currie, W. G., Cowan, H. J., Davis, S. R., Davison, F. C. S., Denistoun, J. A., Dennistoun, J. R., Dennistoun, R. M., Dick, S. E., Evans, A. E. A., Ferg, F. M., Fripp, C. A. I., Galloway, J., Garton, M. H., Gill, H. D. A., Guild, W. F., Greer, R. F., Hastings, V. J., Higginbotham, R. E., Hill, A. R., Hoskins, R., Howell, E. L., Jameson, G. W., Jamieson, C. N., Jones, T. H., Kemp, A. G., Love, J., MacAlpine, C. D. H., Maclean, R. M., Martin, W., Matheson, E. H., McBride, A., McKay, A. A. S., McKenna, D., McMeans, E. D'H., Mills, E. R. R., Milne, J. J., Montague, F. F., Morley, A. W., Munro, J., Montague, P. J., Munson, N., Naylor, L. A., Newberry, W. F., O'Grady, G. F., Ormond, D. M., Pratt, A. M., Popham, E. C., Price, J. S., Ptolemy, J. A., Patton, K. L., Reid, H. R., Reed, J. A., Lincoln-Reynolds, J. E., Richardson, R. H., Riley, H. J., Rosen, S., Ross, G. H., Rutherford, A. B., Rutherford, G. S., Ross, A. M. S., Sheringham, C. J. deB., Simpson, F. I., Struthers, R. E., Sutherland, J., Thomson, J. G., Thomson, J. S., Turner, M. H., Thomas, C. T., Tidmus, R., Williams, O. R., Ward, C. D., Wilkinson, E. B., Williams, J. L., Williams, A. C., Wallar, W. M.

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CHIEF JUSTICE COCKBURN: A REMINISCENCE.

Lord Chief Justice Cockburn was the only son of Sir Alexander Cockburn, British Envoy extraordinary and Minister Plenipotentiary to the State of Columbia. He was born on the 24th of December, 1802. He entered the Middle Temple in 1825, and was called to the Bar in 1829. He practised for some time, principally as Parliamentary Counsel, before election committees. After long waiting his opportunity at length came. In 1843 he was retained by M'Naghten, a wild Scotchman, who shot Edward Drummond, private Secretary of Sir Robert Peel. It was supposed at the time the shot was intended for Sir Robert. By an eloquent and brilliant speech he succeeded in securing the acquittal of the prisoner on the ground of insanity. It was one of the most sensational trials of the day. It finally settled the law once and for all as to the criminal responsibility of lunatics. The verdict, likewise the question of the nature and extent of the unsoundness of mind, which would excuse the commission of a felony of this sort, was made the subject of a remarkable debate in the House of Lords, in March, 1843. There was so much uncertainty, in this branch of the law, it was determined to take the opinion of the judges on the law governing such cases. Consequently the law on the criminal responsibility of a lunatic, when insanity is set up as a defence, was settled by the judgment of Lord Chief Justice Tindal in these words: "In order to establish a defence, on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. . . . If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable. The course, therefore, to be adopted should be, to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong, accompanied with such observations and explanations as the circumstances of each particular case may require." The law thus laid down by Lord Chief

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Justice Tindal, in 1843, was substantially incorporated in the Criminal Code of Canada.

In 1847 Cockburn stood for Parliament, and was elected Liberal M.P. for Southampton. Having caught the ear of the House, his opportunity, in this new theatre of action, soon occurred. It arose in this manner. In 1850, the House of Lords passed a vote of censure on the Government of Lord John Russell, for the act of his Foreign Secretary, Lord Palmerston, regarding his conduct, with respect to Greece, in the Don Pacifico matter. Mr. Roebuck, member for Sheffield, moved a counter vote of confidence, in the House of Commons, upon which hung the fate of the ministry. Don Pacifico, a British subject, resident in Athens, had been mobbed and his house wrecked, in an anti-Semitic outbreak, in which Greek soldiers took part. Compensation was demanded by the British Government and refused. Lord Palmerston despatched the British Fleet to the Piræus and seized all the Greek vessels he could find. Hence the vote of censure in the House of Lords. The gravamen of the alleged offence was the bullying of a small power. On the consideration of Mr. Roebuck's motion, Lord Palmerston's memorable speech of five hours, in defence of his Foreign Policy, concluded with the following splendid peroration:—

"I therefore fearlessly challenge the verdict which this House, as representing a political, a commercial, a constitutional country, is to give on the question now brought before it—whether the principles on which the foreign policy of her Majesty's Government has been conducted and the sense of duty which has led us to think ourselves bound to afford protection to our fellow-subjects abroad, are proper and fitting guides for those who are charged with the government of England; and whether, as the Roman in days of old held himself free from indignity when he could say *Civis Romanus sum,* so also a British subject, in whatever land he may be, shall feel confident that the watchful eye and the strong arm of England will protect him against injustice and wrong."

Mr. McCarthy, in his History of Our Own Times, in referring to the many able speeches made during this great debate, says that of the member for Southampton deserves particular mention: "Never in our time has a reputation been more suddenly, completely and deservedly made than

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Mr. Cockburn won by his brilliant display of ingenious argument and stirring words. He defended the policy of Palmerston with an effect only inferior to that produced by Palmerston's own speech, and with a rhetorical grace and finish to which Palmerston made no pretension."

Greville, in referring to this speech, said: "It will probably secure for him the post of Solicitor-General. He was correct. Shortly after, in the same year, he was appointed Solicitor-General by Lord John Russell, and in 1851 became Attorney-General, which position he held until the resignation of the Ministry, in 1852. He again became Attorney-General, during Lord Aberdeen's Ministry. He added greatly to his reputation, when, as Attorney-General, he conducted the prosecution of the notorious Palmer poisoning case. It was his cross-examination of an Attorney, by the name of Smith, on the trial of Palmer, for taking the life of Cook by poison, which mainly contributed to the conviction of the prisoner. Mr. Justice Stephens said of it: "It was something to be heard and seen, but incapable of being described."

It was at *Nisi Prius* that Cockburn shone with brilliant effect and was generally acknowledged a great verdict winner. His courtesy and high breeding forbade his descending to the vulgar practice of badgering witnesses—a practice even at this day altogether too common. The following extract is taken from an Article of his published in a law journal showing the strong view he held on this question: "I deeply deplore that members of the Bar so frequently unnecessarily put questions affecting the private life of witnesses, which are only justifiable when they challenge the credibility of a witness. I have watched closely the administration of justice in France, Germany, Holland, Belgium, Italy, and a little in Spain, as well as in the United States, in Canada, and in Ireland, and in no place have I seen witnesses so badgered, browbeaten, and in every way so brutally maltreated as in England. The way in which we treat our witnesses is a national disgrace and a serious obstacle, instead of aiding the ends of justice. In England the most honourable and conscientious men loathe the witness-box. Men and women of all ranks shrink with terror from subjecting themselves to the wanton insult and bullying misnamed cross-examination in our English Courts. Watch the tremor that passes the frames of many persons as they

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enter the witness-box. I remember to have seen so distinguished a man as the late Sir Benjamin Brodie shiver as he entered the witness-box. I dare say his apprehension amounted to exquisite torture. Witnesses are just as necessary for the administration of justice, as judges or jurymen, and are entitled to be treated with the same consideration, and their affairs and private lives ought to be held as sacred from the gaze of the public as those of the judges or the jurymen. I venture to think that it is the duty of a judge to allow no questions to be put to a witness, unless such as are clearly pertinent to the issue before the court, except where the credibility of the witness is deliberately challenged by counsel and that the credibility of a witness should not be wantonly challenged on slight grounds."

Cockburn, however, was not one to be trifled with. When necessary he could take an impertinent witness in hand and pretty quickly lay him by the heels.

He continued as Attorney-General until 1856, when he was appointed Chief Justice of the Court of Common Pleas. In 1859, when Lord Palmerston came into power, Cockburn was appointed Lord Chief Justice of the Court of Queen's Bench, and continued as such for twenty-one years. He died in harness. On the day of his death, the nineteenth of November, 1880, he sat all day in the Court of Crown Cases Reserved, presiding with his usual dignity and vigour, walked home and taking suddenly ill, died before midnight.

Among the many important civil cases tried by Chief Justice Cockburn, a few may be mentioned. That of *Campbell* v. *Spottiswoode*[1] definitely settled the question as to the liability of defendants, in actions of libel in reference to newspaper articles. This was an action brought against the printers of the "Saturday Review" for publication of an Article, commenting on a circular issued by the plaintiff, inviting subscriptions for mission work in China. The Article was severe, bitter and caustic, and imputed to the plaintiff that he acted on sordid and base motives in soliciting subscriptions. The Chief Justice directed the jury substantially as follows: "When a writer in a newspaper or elsewhere commenting on public matters makes imputations on the character of individuals concerned in them, which are false and libellous as being beyond the limits of

[1] 3 F. & F. 421.

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fair comment, it is no defence that he *bona fide* believed in the truth of these imputations." Under this charge verdict was found for the plaintiff. Bovill moved, pursuant to leave granted to move, to enter the verdict for defendant. See *Campbell* v. *Spottiswoode.*[2] In refusing the Rule the Chief Justice made further comment as follows: "If the proposed scheme were defective or utterly disproportionate to the result aimed at, it might be assailed with hostile criticism. But then a line must be drawn between criticism upon public conduct and the imputation of motives by which that conduct may be supposed to be actuated; one man has no right to impute to another, whose conduct may be fairly open to ridicule or disapprobation, base, sordid and wicked motives, unless there is so much ground for the imputation that a jury shall find, not only that he had an honest belief in the truth of his statements, but that his belief was not without foundation." Such then was the considered judgment of the Court of Queen's Bench, in 1863, as to the questions of "privilege" and "fair comment" in actions of libel. Apparently these questions would seem to have been settled upon an intelligent and satisfactory basis.

In 1872 the Court of Common Pleas, however, ignored the decision in *Campbell* v. *Spottiswoode,* and held in *Henwood* v. *Harrison,*[3] that the fair and honest discussion of or comments upon a matter of public interest is in point of law privileged, and is not the subject of an action, unless the plaintiff can establish malice. The plaintiff was nonsuited, on the ground that the publication was in the nature of a fair criticism of a proposal affecting a matter of great national importance, and, therefore, being *bona fide,* and without malice, privileged. On appeal, the Court, Grove, J., dissenting, held that the non-suit was right.

Willes, J., in delivering the judgment of the majority of the Court (Willes, Byles and Brett, JJ.), said (p. 626): "In the present case, there was no suggestion and no evidence of malice in any one. The honesty of the publication and the absence of malice were admitted; and there was nothing to be decided except the question of law, whether the occasion was privileged. The learned judge ruled that it was." In 1887, in *Merrivale* v. *Carson,*[4] the Court

[2] (1863). 3 B. & S. 769.
[3] L. R. 7 C. P. 606.
[4] 20 Q. B. D. 275.

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of Appeal held that where an action of libel is brought in respect of a comment on a matter of public interest, the case is not one of privilege, and actual malice need not be proved, and that it is for the jury to determine whether the comment goes beyond the limits of fair criticism. *Henwood* v. *Harrison* was dissented from and *Campbell* v. *Spottiswoode* approved and followed. The action was brought to recover damages for an alleged libel contained in a critique published by defendant upon a play written by the plaintiff and his wife. The jury found a verdict for the plaintiff. On appeal the judgment was affirmed. Lord Esher, M.R., in delivering the judgment of the Court, at p. 279 and following, said: "What is the next question to be put to the jury? Are they to be told that a criticism of a play is a privileged occasion, within the well-settled meaning of the word "privilege," and that their verdict must go for the defendant, unless the plaintiff can prove malice in fact, that is, that the writer of the article was actuated by an indirect or malicious motive? I think it is clear that that is not the law, and that it was so decided in *Campbell* v. *Spottiswoode,* which has never been overruled."

Among the many celebrated cases in which Chief Justice Cockburn took a leading or prominent part, that of *Sugden* v. *Lord St. Leonards,*[5] from almost every standpoint, the position of the parties interested, the amount involved, the mystery surrounding a lost Will, the importance of the decision reached and the masterly judgments of Sir George Jessel, Master of the Rolls, Lord Justice Mellish and Chief Justice Cockburn, on appeal from the judgment of Sir James Hannen, President of the Probate Division, is absorbingly interesting and reads like a romance. Seldom has an abler Court met than this which sat to consider the important questions involved in this appeal. It was an action brought by the Executors of Edward Lord St. Leonards, against the Right Honourable Edward Burtenshaw, Baron St. Leonards, the grandson and heir-at-law of the deceased. The proceedings before the President of the Court of Probate Division were taken to propound the lost Will of Edward Lord St. Leonards, better known as the famous author of Sugden on Vendors and Purchasers, and pronounced by Sir James Hannen as "one of the greatest lawyers that ever lived." He was the son of a barber

[5] (1876), 1 P. D. 154.

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and by the sheer force of will power, aided by transcendant ability, reached the woolsack and became the founder of a peerage. His immortal work on Vendors and Purchasers was written before he was twenty-two years of age. For one edition of the many, of this great work, he received the unprecedented sum of Four Thousand pounds. He left an estate of over Three Hundred Thousand pounds. He died in 1875 at the advanced age of 93. All his daughters were married except one, Charlotte, who for years had been the constant companion and the amanuensis for her father. Of his seven sons only one survived. His eldest son had died in 1866, leaving his eldest son, the defendant, the present Lord St. Leonards. His last Will and Testament, which was holograph, was executed in 1870, five years before his death. There were eight codicils, all holograph, written between that date and the 23rd of August, 1873, the date of the last codicil. The Will and the codicils were locked in a box by Lord St. Leonards and kept in his room, to which the members of the household had access. The custody was not a close one. It was last seen by his daughter in August, 1873, eighteen months before his death. On opening the box, after his death, it was found the Will had been abstracted, but the codicils were intact. Charlotte Sugden, one of the executors and one of the residuary legatees, was directed by her solicitor to make a written statement from memory of its contents, without reference to the codicils. This written statement drawn from memory formed the basis upon which the Court was asked to find as a fact that the Will of 1870 was duly executed and attested, and that the contents of the Will were as set out in the written statement of Charlotte Sugden. It appeared in evidence, her father read it over and carefully explained its contents to her before execution; that she had read it over, after execution, several times; that she was with her father when the different codicils were prepared and the Will was examined as each codicil was written. On the other hand it was shown the Will was a complicated one, filling nineteen pages and affecting the interests of so many who had claims upon his bounty. Miss Sugden admitted she could not recollect all of the provisions of the Will, nor the names of all the legatees, nor the amounts devised to several of them. It further appeared that if the Will as propounded should be established, no provision whatever was

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made for the peerage, in the event of its devolving upon a certain other member of the family. Between the time when the last codicil was written and the day of his death, he spoke to several what satisfaction it gave him that he was able to make suitable provision for the various members of his family, who were dependent upon his bounty. To one friend, shortly before his death, he said: "I have made all the testamentary dispositions which a father ought to make for his family, and I die in peace with that conviction." On another occasion he said: "To put off making your Will until the hand of death is upon you evinces either cowardice or a shameful neglect of your temporal affairs. It is sinning in your grave." The mystery surrounding this Will has ever since been the subject of frequent comment. It was drawn with the greatest care by one of the ablest lawyers of the age. He endeavoured with great diligence and foresight to guard against every possible contingency of uncertainty and confusion in the disposition of the handsome estate he had accumulated by industry and the peerage he had founded, and that the objects of his bounty should enjoy the benefits he desired to bestow. It is needless to enumerate the various conjectures which the ingenuity of the profession has devised as to the fate of this Will. The riddle to this day remains unsolved. However, it is attended with this advantage that it contains several valuable lessons, and finally settled many doubtful legal questions. The case is a storehouse of law on the subject of proof of lost Wills. Before this case, there had been established the principle that the contents of a lost Will, like those of any other lost Instrument, might be proved by secondary evidence. But in such cases the Wills were short, simple and contained no intricate or conflicting dispositions and were established by written instructions and drafts. In *Wharram* v. *Wharram*,[6] Lord Penzance pointed out how necessary it was to exact the strictest proof of the contents of a lost Will as distinguished from other documents, especially since the passing of the Wills Act. Further, before this case, post-testamentary declarations of the testator could not be received, in the event of the loss of a Will, as secondary evidence of its contents. See *Quick* v *Quick*.[7]

[6] 3 Sw. & Tr. 301.
[7] 3 Sw. & Tr. 442.

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Then what was really decided by this notable case?

(1) The contents of a lost Will may be proved by the evidence of a single witness, though interested;

(2) That in proof of its contents, confirmatory evidence may be given of post-testamentary declarations on the part of the deceased testator, overruling *Quick* v. *Quick* (Mellish, L.J., dissenting as to declarations made after the execution of the Will);

(3) When the contents of a lost Will are not fully established, probate will be granted to the extent to which it is proved;

(4) That Lord Penzance's dictum in *Wharram* v. *Wharram* was overruled;

(5) That a codicil may be admitted to probate, when the contents of a lost Will is incapable of proof;

(6) That all statements or declarations, written or oral, made by a testator at or prior to the execution of his Will, are admissible as evidence of its contents, as well as post-testamentary declarations;

(7) A subsequent Will is no revocation of a former one, if the contents of the subsequent Will are unknown. And the law is the same even if the later Will be expressly found to be different from the former, provided it be unknown in what the difference consists. This is upon the point as to whether probate can be granted of a Will of which only a part is known.

The able judgment of Sir George Jessel, Master of the Rolls, entirely oral and extending over seventeen pages of the law reports, so logical, conclusive and exhibiting such a firm grasp of legal principles, should be carefully studied in cases where a like question arises. Jessel was the first Jew who had ever held judicial office in England. Of him it has been said: "Next to Hardwicke he was the greatest Equity Judge of England." Cockburn's luminous judgment, elaborated with great care, distinguished for its lucidity and refined diction and the orderly manner of grouping the principal facts of the case, will for all time be regarded as an ideal exposition of the law in proof of lost Wills.

Another case of great popular interest, in which Cockburn took the leading part, was that of *The Queen* v. *Keyn*,[8] better known as the Franconia case. The Franconia was

[8] (1875), 2 Ex. D. 63.

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a foreign vessel, commanded by a foreigner, and sailing for a foreign port. In passing down the English Channel, within three miles of the English coast near Dover, she ran down a British ship and drowned a passenger. The captain was indicted for manslaughter and found guilty. On appeal from this decision, the question for the opinion of the Court for Crown Cases Reserved was, whether the Central Criminal Court had jurisdiction. The judgment of Cockburn was a most learned disquisition on the powers of English Courts for the trial of criminal offences committed on the high seas and in Territorial waters; as well as the rights, private, national, and international, within the jurisdiction of the Admiralty of England. Cockburn's judgment, like most of his judgments, in important cases, and in his charges to Grand Juries, was an elaborate treatise on the leading subject under consideration. The conviction was quashed. The result of this case led to the passing of the Territorial Waters Jurisdiction Act, 1878.

The Chief Justice tried, at Bar, Orton or Castro, in the Court of Queen's Bench, for perjury committed, during the trial of the action of Ejectment, *Tichborne* v. *Lushington*. Sir John Coleridge and Sir Henry Hawkins conducted the prosecution. The prisoner was defended by Dr. Kenealy. The trial lasted 188 days, the longest on record, excepting that of Warren Hastings. His charge to the jury lasted 18 days in its delivery. It was published in 1874, in two volumes of 800 pages each. The trial of this memorable case stands an unparalleled feat in judicial annals. In 1875 Dr. Kenealy moved, in the House of Commons, for a royal commission to inquire into the conduct of the Tichborne trial. Mr. Disraeli, then Prime Minister, said of Cockburn: "He is a man of transcendent abilities, his eloquence is remembered in this House, and when he left it to ascend the highest tribunal almost within the realm, he sustained the reputation which he had attained here and in the Courts of his country with learning and majesty."

Chief Justice Cockburn represented Great Britain, under the Treaty of Washington, at Geneva, in the Alabama arbitration claims. He dissented from the Award and explained his reasons in an elaborate report, dated September 14th, 1872. He held the British Government liable for the depredations of the Alabama. He considered that in the case

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of the Florida, want of due diligence was not sufficiently proved, and in the case of the Shenandoah no blame attached to the British Government at all. A majority of the five arbitrators awarded in satisfaction and final settlement of all claims, including interest, the sum of three and a quarter million pounds sterling. The Americans had preferred before the Tribunal a demand of nine millions and a half, and thus got a little more than one-third of what they had asked. Of this, the greatest of all arbitrations, John Morley said: "The Treaty of Washington and the Geneva arbitration stand out as the most notable victory in the nineteenth century, of the noble act of preventive diplomacy, and the most signal exhibition in their history of self-command, in two of the three chief democratic powers of the western world."

In the many *causes celebres* in which Chief Justice Cockburn took part, not the least notable was his charge to the Grand Jury on an indictment preferred against Col. Nelson and Lieutenant Brand for the alleged murder of Gordon, on the 23rd of October, 1865, in Jamaica. Shortly after my admission to the Bar, I spent some time in London, visiting the various Courts. It was my good fortune to hear the brilliant charge of the Chief Justice in this case. I wrote a description of it for a Saint John newspaper, a copy of which I here append, *verbatim et literatim*:—

London, April 12th, 1867.

On Wednesday Lord Chief Justice Cockburn, accompanied by Baron Channel, attended the Central Criminal Court, Old Bailey, for the purpose of charging the Grand Jury in the Nelson and Brand case. Many of the Aldermen of the City were present, as well as Earl Granville. Colonel Nelson appears to be quite a young man, with dark curly hair, and a light moustache; Lieutenant Brand is still younger, a plain, unassuming person. The circumstances of the case are simply these. Shortly after the occurrence of the riot, at the Court House in Morant Bay, in the Island of Jamaica, Mr. Gordon, who was generally believed to have been the instigator of the rebellion and an accomplice with those engaged in it, went to the commander of the British forces at Kingston, and gave himself up, warrants having been issued for his apprehension. The Governor and the

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Custos Rotulorum went to the residence of Gordon, arrested him and ordered him to be sent to Morant Bay.

Colonel Nelson, one of the accused, in command of the forces of that place, instituted a Court Martial, composed of himself, Lieutenant Brand of the Navy, and two others. Mr. Gordon was arraigned before them, found guilty of high treason, and sentenced to be hung. Mr. Gordon was consequently hung, and this case arose in respect to the legality of their proceedings. The Chief Justice gave a full and graphic description of the outbreak in Jamaica, and then proceeded to state that the prosecution proceeded on two grounds; first, that those who had tried and sentenced Mr. Gordon had acted entirely without jurisdiction; and, secondly, if they had jurisdiction it had not honestly or legitimately been exercised. Governor Eyre had proclaimed martial law on the Island, except at Kingston. Mr. Gordon, although he lived a short distance out of the city, did business in it, and there delivered himself up to the authorities.

The first question he would consider was, whether the Governor had authority to proclaim martial law; the second, if such authority existed, and the Court Martial was established upon the assumption of its existence, whether the jurisdiction had been impartially exercised. His lordship, after giving a lengthened outline of the history of the Island, since it came into the hands of the British, pronounced it not a Crown Colony, but a settled Colony, and that martial law could only be exercised by express legislative enactment. He next proceeded very elaborately to enumerate every instance of the exercise of martial law, tracing it from its fountain head, from the reign of Edward the Second till the time it was last resorted to in England, in the reign of Charles the Second. Although there had been rebellion since, in the reign of James the Second, also in 1723 and 1745, martial law was not proclaimed. When the Lord Lieutenant of Ireland proclaimed martial law in that country in 1798, he deemed it necessary to obtain bills of indemnity afterwards. So martial law was resorted to only in cases of great emergency and when every other means to suppress rebellion proved abortive. He administered a severe and cutting rebuke upon such as held that martial law was of easy application and a thing perfectly settled in this country.

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After dilating at great length upon the mode of procedure in Military Courts, his lordship referred to the Jamaica statutes and said: "The Act passed by the legislature of that country, in the ninth Victoria, would seem to have given the Governor power to exercise martial law. He next proceeded to enquire whether Mr. Gordon was amenable to its jurisdiction. After the declaration of martial law, Kingston was excepted, and it appeared Mr. Gordon did business there. The authorities took him from Kingston, where there was no martial law, and took him to Morant Bay, where it was in force; this he considered an unjustifiable act, and he had arrived at this conclusion after the most careful consideration. His lordship next considered the constitution of the Court Martial before which Mr. Gordon was tried. One of its members, Col. Nelson, belonged to the Army; the other prisoner charged, Lieutenant Brand, belonged to the Navy. There was no authority for blending the two services in forming a Court Martial. He commented with severity upon the procedure before the Court Martial thus established. Nine-tenths of the evidence, he said, upon which Mr. Gordon was convicted and sentenced to death was altogether inadmissible, and would not have been received had a competent judge presided, or if those who had presided had any experience in Courts Martial. Secondary evidence had been admitted, when it was in their power to have the best. (Colonel Nelson seemed ill at ease during this part of his lordship's charge.) This brought him to the second question he proposed to consider—whether the jurisdiction, if well founded, had been honestly and impartially exercised. And in assisting them in arriving at a conclusion on this point, he would direct their attention to the moral worthlessness as well as inconclusiveness of the evidence upon which Mr. Gordon had been convicted. The depositions of certain witnesses had been received, when the persons themselves could have been called as witnesses, contrary to the spirit and justice of English law. The three points upon which his lordship most emphatically dwelt were: the removal of Mr. Gordon to Morant Bay, which was an illegal act; the illegality of the Court Martial by which he had been tried, and the admission of improper evidence.

This, in many respects, may be regarded as one of the most important cases of modern times. The charge of his

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lordship lasted nearly six hours, and is pronounced to be one of the most learned and luminous expositions upon martial law ever delivered, and it is believed will rank with the most celebrated judicial expositions extant.

The Lord Chief Justice speaks in an easy, fluent style, and has the happy faculty of throwing around dull, dry facts and knotty legal points the charm of a brilliant rhetoric.

Notwithstanding the Lord Chief Justice's charge, the Grand Jury agreed in finding "No Bill"; and at the same time made a short presentment, that "martial law should be more clearly defined by legislative enactment."

Although forty-eight years have passed since I sat for nearly six hours spell-bound under this admirable charge, so vivid was the impression made it remains almost as fixed in memory as on the day of its delivery.

The lofty conception Cockburn had formed of the duty of an advocate found fitting expression in a speech delivered at a Banquet given by the Bar, in the Middle Temple Hall, in 1864, to the celebrated French Advocate, M. Berryer. Lord Brougham, in response to a toast, had said: "The first great quality of an advocate is to reckon everything subordinate to the interests of his client." Shortly after Lord Chief Justice Cockburn, in replying to the toast of "The Judges of England," said: "Much as I admire the great abilities of M. Berryer, to my mind, his crowning virtue—as it ought to be that of every advocate—is that he has throughout his career conducted his cases with untarnished honour. The arms which an advocate wields he ought to use as a warrior, not as an assassin. He ought to uphold the interests of his clients *per fas* and not *per nefas*. He ought to know how to reconcile the interests of his client with the eternal interests of truth and justice."

Of these words it has been said: "They are the best epitaph which can be bestowed on Sir Alexander Cockburn."

SILAS ALWARD.

St. John, N.B.

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THE AMERICAN SOCIETY OF INTERNATIONAL LAW.

The April number of the quarterly *Journal of the American Society of International Law* is an unusually interesting one, even if it is judged by the high standard set by that Society in the past nine years of its existence. Nor can one help expressing his admiration of the handsome form in which the *Journal* appears. The contents of the *Journal* are grouped in several distinct departments, which are worth enumerating for the purpose of conveying some impression of the wealth of material contained in one number.

There are, in the first place, a chronicle of international events from day to day, a list of public documents relating to international law published in Great Britain and the United States, and an index to the periodical literature of international law. The assistance which these render to the student requires no comment.

The book reviews are another valuable feature. Each review is vouched for by the name of its writer, and an attempt is made to give an account of the book reviewed and to estimate its place in the literature of the subject in a way that is so far from perfunctory that it affords a very helpful guide to the reader. It is submitted that the value of a bibliographical notice would be increased if the price of the book were added to the other particulars given, especially in the case of a foreign work.

Another department consists of reports of judicial decisions involving questions of international law, and a separate quarterly supplement is also published containing official documents of an international character. The service rendered to the science of international law by the publication of unabridged reports of cases and texts of important public documents is so great as to merit a special word of commendation. It seems a pity, however, that the English prize decisions should not be reprinted from the official law reports (accompanied by the official mode of citation), rather than from some less authoritative source. For example, the following paragraph from the judgment of Sir Samuel Evans [1]

[1] Whose name, by the way, is not given in the *Journal* at the head of the judgment, he being referred to merely as "The President." He is, of course, the President of the Probate Divorce and Admiralty Division of the High Court of Justice. By the Judicature Act, 1891, the High Court was declared to be a Prize Court within the meaning of the Naval Prize Act, 1864, and all prize causes were assigned to the Division above mentioned.

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in "The Mowe," as reported in [1915] P. 1, at p. 15, is reported in an incomplete form in the *Journal*, the noteworthy words which I have put in italics being omitted:—

> "For the considerations to which I have adverted, *and in order to induce and justify a conviction of fairness, as well as to promote just and right decisions,* I deem it fitting, pursuant to powers which I think the Court possesses, to direct that the practice of the Court shall be, that whenever an alien enemy conceives that he is entitled to any protection, privilege, or relief under any of the Hague Conventions of 1907, he shall be entitled to appear as a claimant and to argue his claim before this Court."

Over half the contents of the *Journal* consists of leading Articles and editorial comment, and to these two departments the rest of my observations will be confined.

The first article—*An Anglo-American Prize Tribunal*, by Simeon E. Baldwin—is written in support of the suggestion made in March last by Sir John Macdonell for the establishment of a joint appellate Prize Court, similar in principle to that contemplated by the twelfth convention of the Hague Conference of 1907, but confined to the two nations whose prize law is for the most part identical. Perhaps the most interesting feature of the Article is the comparison drawn between the situation existing in 1806 and the following years as a result of the British orders-in-council forbidding trade with France and that existing to-day by virtue of the order-in-council of March, 1915, in regard to trade with Germany. In 1811, Sir William Scott held[2] that a certain order-in-council was justified as a measure of retaliation against France,[3] although it would not otherwise have been justified by international law.[4] This very question, namely, how far the conduct of one belligerent will justify another belligerent in adopting retaliatory measures to the detriment of neutrals may soon be raised in a definite form. So lately as July 14th

[2] The Fox, Edw. 311. 2 Roscoe's Prize Cases, 61.

[3] In retaliation for the British order-in-council of 1806. Napoleon had issued his famous Berlin decree, declaring the British Islands to be in a state of blockade, and had subsequently adopted other measures against British trade, against which in turn the British retaliated.

[4] But it is difficult to see how a belligerent can be entitled to retaliate as against neutrals. Sir William Scott, however, believed that the order-in-council was justified as a measure of retaliation, and that he was not deciding contrary to the principles of international law. *Cf.* Baty and Morgan, '*War, its Conduct and legal results*,' p. 360.

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last, the American Ambassador at London was instructed to present to the British Government a communication, of which the following is the official summary made public by the Secretary of State of the United States:—

> "In view of the differences which are understood to exist between the two Governments as to the principles of law applicable in Prize Court proceedings in cases involving American interests, and in order to avoid any misunderstanding as to the attitude of the United States in regard to such proceedings, the Government of the United States informs the British Government that, in so far as the interests of American citizens are concerned, it will insist upon their rights under the principles and rules of international law as hitherto established, governing neutral trade in time of war, without limitation or impairment by orders-in-council, or other municipal legislation, by the British Government, and will not recognize the validity of the Prize Court proceedings taken under restraints imposed by British municipal law in derogation of the rights of American citizens under international law."[5]

In this connection, James W. Garner's Article, entitled *Some Questions of Law in the European War,* is of special interest. This is the continuation of a series of Articles, of which the first instalment appeared in the January number. The dispassionate tone which is characteristic of the contributions to the *Journal* is here specially noteworthy, because in the present instalment, Mr. Garner discusses such contentious subjects as contraband, right of search, and continuous voyage. The right of search is, of course, admitted, but the Government of the United States has found fault with the manner in which the British Government has exercised the right, and, specifically, has complained of the seizure of ships on mere suspicion, the taking of them into port for examination, and their undue detention there. It is, also, argued that some of the British additions to the list of absolute contraband cannot be reconciled with the practice of the past, and that the distinction between absolute and conditional contraband has been to a great extent ignored. These, however, are matters which can be intelligibly discussed only in detail, and I can merely recommend to the reader the careful per-

[5] New York Times, July 18th, 1915. It is understood that this communication will be answered by the British Government at an early date.

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usal of Mr. Garner's Article, as well as the communications which have passed between the British and American Governments. A new British note is now in the hands of the American Government, but is being withheld from publication at the request of the British Government, until the delivery of a supplementary note now in course of preparation. Both these notes will possibly be in the hands of the public before this Article appears, and it is understood that they will discuss in detail some of the questions here noted.

It is alleged against the British Government that it has unjustifiably extended the doctrine of continuous voyage to conditional contraband, that is to say, it has seized vessels bound for neutral ports with cargoes consigned 'to order' on the charge that the cargoes were really intended for German contractors in the neutral countries, so that the voyage or transit from the United States to Germany was really a continuous one. This matter of complaint by the American Government is less likely to excite sympathy outside of the United States owing to the leading part which that country took in extending the doctrine of continuous voyage during the Civil War. It is true that in most of the cases in which the question was then raised, a substantial part of the goods was absolute contraband, but the doctrine was not confined in terms to absolute contraband, or to contraband at all.

An extreme case was that of *The Springbok*.[6] A British sailing vessel was captured on its way from London, about 150 miles east of Nassau, Bermuda, when making for the latter port. The cargo was by the bills of lading consigned 'to order or assigns,' and the Master was instructed to deliver the goods to the owner's agent at Nassau. A small part of the cargo consisted of arms and munitions of war. A substantial part consisted of articles susceptible of either peaceful or warlike use, that is, conditional contraband. The larger part was non-contraband. The Supreme Court of the United States held that, although the cargo was to be discharged at Nassau, its real ultimate destination was one of the blockaded Confederate ports, and that it was rightly condemned, *whether it was contraband or not.*

In its application to non-contraband goods in case of blockade, the doctrine of continuous voyage has been the subject of much adverse criticism.[7]

[6] (1866) 5 Wall. 1.
[7] See Moore, *Digest of International Law*, vol. 7, secs. 1256-1261.

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Although, by the Declaration of London of 1909,[8] the doctrine is excluded both as to blockade and as to conditional contraband, its exclusion, in the case of blockade, rests on a more solid logical basis than in the case of conditional contraband. Breach of blockade, or the attempt to break blockade, is an offence which is charged against the ship as distinguished from its cargo, and if a ship is making for a neutral port with the intention of discharging its cargo and ending its voyage there, it cannot logically be charged with breach of blockade merely because its cargo is intended to be forwarded to a blockaded port by some other means of transportation. *Ex hypothesi*, the ship has no intention of breaking blockade. On the other hand, the essence of contraband, whether absolute or conditional, is the hostile destination of the cargo as distinguished from the ship; and, apart from the compromise affected by the Declaration of London,[9] there is no logical obstacle to the application of the doctrine of continuous voyage, because that doctrine merely looks beyond the intermediate neutral destination of the cargo for the purpose of ascertaining the real ultimate destination. The fact that the ship intends to end its voyage at the intermediate neutral port, while it is conclusive evidence that the ship is innocent of attempting to break blockade, is not necessarily conclusive evidence that it is not conveying contraband of war, because the guilt of the ultimate destination may attach to the goods before their arrival at the neutral port.

The deduction drawn by the Supreme Court of the United States in the *Springbok* case from the fact that the goods were consigned 'to order,' instead of being consigned to a named consignee in Nassau, is also of special interest, in view of the complaint made by the Government of the United States during the present war, because the British Government is drawing a similar deduction as to the ultimate destination of goods from a similar wording of the bills of lading in the case of goods shipped by American merchants to neutral ports in Europe.

Another Article—*The Theory of the Independence and Equality of States*, by Philip Marshall Brown—cannot be briefly summed up, but the application to the European situation of the conclusions reached in the Article may be

[8] Which is not binding on the belligerents in the present war.
[9] Which made the doctrine of continuous voyage applicable to absolute contraband, but excluded it as to conditional contraband.

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mentioned. The principle of the balance of power is condemned as having proved not only futile, but a menace to the existence of the big as well as of the little States. The basic principles suggested to be observed in the reconstruction of the map of Europe are (a) respect for the claims of nationalities so far as is compatible with the entire interests of a State taken as a whole; (b) satisfaction of the economic requirements of a State to the fullest extent, so that it may be reasonably self-sufficient and in no way a burden to the rest of the world. Finally it is argued that a common fundamental conception of rights and obligations is the first requisite for giving full effect to the reign of international law, and it is urged that less attention should be paid to the drafting of conventions governing the conduct of war, and that more attention should be paid to the drafting of laws to govern the peaceful relations of States.

In *The International Aspects of the Titanic Case* Arthur K. Kuhn discusses the question of conflict of laws arising from the various municipal statutory limitations of the shipowner's liability. Norman Bentwich' contributes a second instalment of *International Law as applied by England during the War,* his particular subject being *Trading with the Enemy.*

The last Article is the first instalment of *The Diplomatic Correspondence Leading up to the War,* by William Cullen Dennis, and consists of a careful analysis of the contents of the official "papers" and "books" of various colours published by the belligerent Governments[10] relating to the period from the Austrian note to Serbia to the Declaration of war by Austria on Serbia, July 23rd-28th, 1914. The writer, after discussing the general question of the evidential value of the documents, traces the course of events between the dates mentioned, in the light of critical observations published by various advocates, chiefly in the *New York Times,* and concludes as follows:—

> "Assuming in favour of the Allies that one hundred years of history have shewn that there is an Eastern question, and that this question is admittedly a matter of common concern for the great Powers of Europe, and

[10] In the quarterly supplements to the *Journal* now under review these documents are all being reprinted unabridged in English.

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concluding from the diplomatic correspondence itself that Austro-Servia relations had been recognized by all parties since 1909 as forming a part of this common concern;

"Assuming in favour of Germany and Austria that the circumstances surrounding the assassinations of Serajevo gave Austria a legitimate cause of complaint against Servia, and concluding from the *ex parte* evidence presented in behalf of Austria and included in the diplomatic correspondence, that Servia ought to have offered spontaneously to start an investigation of Austria's allegations of complicity on the part of Servian officials in the assassinations;

"It is submitted that the correspondence from the Austrian note of July 23rd to the Austrian declaration of war on Servia shews that Austria and Germany assumed at the outset a provocative and unadmissible attitude and consistently declined during this period to modify that attitude; that, on the other hand, the Powers of the Triple Entente—and particularly Great Britain—during the period in question, constantly sought to preserve the peace of Europe. Up to this point, therefore, it is submitted that the onus of bringing on the war rests unmistakably with Germany and Austria. If a justification of Austria and Germany is to be made out on the official documents, it must rest on the correspondence subsequent to July 28th, which will be considered in a subsequent Article."

There remain sixty pages of *Editorial Comment*—presumably chiefly from the pen of James Brown Scott, the distinguished editor-in-chief of the *Journal*. In the first place, under the heading *American Neutrality* is reprinted the letter dated January 8th, 1915, addressed by William Jennings Bryan, the Secretary of State, to William J. Stone, chairman of the Senate Committee on Foreign Relations, answering, one by one, twenty grounds of complaint alleged by Austro-German "sympathizers" charging the United States with partiality to the Allied Powers. This document was doubtless prepared and presented to Bryan for signature by the more competent gentleman who has since succeeded him as Secretary of State. The letter is long and ably written, and ought to convince any impartial person that the Government of the United States has adhered strictly to the law of neutrality. That it has convinced the "sympathizers" is perhaps too much to expect.

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Their real ground of complaint was not against the United States, but against the British fleet, to which, as it is delicately expressed in the letter, 'on the high seas the German and Austro-Hungarian naval power is thus far inferior.'

Lest I should unduly try the patience of the readers and of the editor of the CANADIAN LAW TIMES, I shall merely mention some of the other topics discussed editorially. They are *Seizure and detention of neutral cargoes—Visit and search—Continuous voyage—Mines, submarines and war zones—The absence of blockade—The use of neutral flags on vessels of belligerents—Violations of neutral waters—The internment of German vessels in the United States—The joint resolution of Congress to empower the President to better enforce and maintain the neutrality of the United States—The effect of the war on international law—The effect of Mr. Bryan's peace treaties upon the relations of the United States with the nations at war—The William P. Frye case.*

JOHN D. FALCONBRIDGE.

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ON SOVEREIGNTY.

The theory of Sovereignty seems to be one of those large generalisations which in different ages of the world's history have exerted an empire over the human mind. Like the cure-all of quack salvers they succeed for a time by the sheer audacity of their pretensions. They are accepted because they seem to explain so much. They become the current medium of intellectual exchange, part of the very forms of thought; and it is only at long last that they are exposed as ungrounded or illogical. Even when some thinker, bolder than the rest, has dealt them a lethal blow, they still spring resurgent, for an error once accepted as dogma is harder to stamp out than a plague become endemic. The history of political science records the rise and fall of many such eidola. The conception of Empire which Rome had realized subsisted in theory long after the Roman State had fallen in fragments. The political writers of the Renaissance formulated the Social Contract theory, which in one or other of its evasive forms, obsessed the human mind for more than three centuries. This in turn has given place to the theory of Sovereignty, just as evasive, just as ill-founded, just as unnecessary. Subjected to a searching analysis all such dogmas will be found to contain in them some grain or grains of truth. Thus, the Social Contract theory derives in part from the simple proposition that all obedience is in the last resort voluntary, for, "utterly without our consent we can be at no man's commandment living." It seems that in certain conditions of the political atmosphere some such grain of solid matter propagated by heat will diffuse as gas, in which state it is apt to be asphyxiating and sometimes dangerously explosive. If the Sovereignty theory has been practically innocuous, it must, none the less, be pronounced logically unfounded, and therefore an embarrassment in the sphere of political thought.

Stripped of its embellishments this theory seems to be as follows: Men, it is said, are found living together in large social aggregates called States, larger than the family, but no more than the family the conscious result of human volition. The very idea of a society postulates certain uniformities of conduct upon which the being and the well-being of

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the society depend. Morality consists in the consciousness of such uniformities as rules. Law consists in their formulation and enforcement. The business of formulating and enforcing is called government, and the persons in whom such functions are vested are called the governors of the State. Now, since all States, except the most rudimentary, contain in them the element of government, it is concluded (and this, in particular, is the Sovereignty theory) that in every State (except the most rudimentary) are to be found some persons in whom the prerogative of government is vested. Such persons are commonly described as Sovereign. Law is the command of the Sovereign. Nothing can exist as Law in the State except by the authority of the Sovereign or at all events with the Sovereign's acquiescence. Thence flow as consequences the various corollaries that Sovereignty is unlimited, indivisible, inalienable, and so forth.

This theory, which is to be found in the 16th century in Bodin, and in the 17th century in Hobbes, was proclaimed as gospel by John Austin in his *Lectures on Jurisprudence*. It is therefore usually described as Austin's theory of Sovereignty, though, as we have just mentioned, Austin was in no sense its inventor. He, however, must be credited with having made it a dogma with the English jurists of the second half of the 19th century.

The Austinian theory, naturally, has not passed unchallenged. It has been pointed out that men have been, and in many parts of the world still are, conscious of rules not merely as rules of morality but as rules of law without any idea of an imposing authority. This is Sir Henry Maine's argument. The neo-Austinian replies that such rules are not law at all. This position precludes further argument. If law is to be what anyone chooses to make it, it is idle to pursue a discussion which can lead to nothing but to an elaboration of the definition. It would be more profitable to enquire whether the rules in question exhibit such fundamental resemblances to other rules which are admittedly law, that they may properly be referred to the same order of phenomena. If this is so, the true criterion of law must be found in those resemblances, and not in enactment or enforcement by authority.

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The objection that the theory does not square with facts might surely have prevented its existence, or strangled it at birth, were it not that experience shows that an abstract theory, once conceived by an inventive mind, may exist for long centuries without drawing nutriment from the world of reality. The Sovereignty theory, it is now admitted, is inapplicable to Federal governments, and, indeed, to any rigid constitutions, while even in applying it to the British Constitution, Austin turns his back upon the Sovereign of the lawyers, the *Rex in Parliamento,* to find a Sovereign in the King, the Lords and the electors to the House of Commons—a solution which is hardly reconcilable with his fundamental postulates of the nature of Sovereignty. Confronted with this difficulty some modern writers have sought to distinguish the Sovereign *de jure* from the Sovereign *de facto.* The first, it is said, is the creature of legal theory, which may exhibit more or less imperfectly the attributes of Austinian sovereignty, which may again, from a shifting of the centre of political stability, be a Sovereign only in name, a *roi fainéant,* while the true seat of authority must be looked for elsewhere. This elusive presentment, it will be observed, still asserts the sacred dogma of Sovereignty. There *must* be, we are told, in every State some ultimate and supreme authority—if not here, then somewhere else. It is astonishing that intelligent men should concede to such an argument, astonishing how hard it is to disabuse the mind of an unfounded hypothesis.

Evidently there is some reason for the persistency of such a notion. The reason will be found in the grain of truth out of which the theory has grown. It seems to be an infirmity of the mind to conceive as concrete facts distinctions which are only true as abstract ideas. We distinguish in thought the idea of rule and of obedience to rule. The conception is slightly, but only slightly more concrete, when we speak with Aristotle of the ruling element, "that which rules," and of the subject element, "that which is ruled," as essential elements in the constitution of the State. It is a short step further but a fatal one, when we incarnate this abstraction 'government' in a person or persons whom we term Governor or Sovereign, while all other persons are termed Governed or Subject. The fault lies, not in recognising the patent fact that in every State there are persons

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who rule and persons who obey (though of course, the rulers are also obeyers and the obeyers are also rulers), but in predicating of the first all that is implied in the abstract notion of government, and deducing therefrom the corollaries of Sovereignty as unlimited, impartible, etc., which, if asserted of governmental functions as exercised by this man or by this body of men, are demonstrably false. In much the same way the logical necessity of viewing consent as inseparable from the idea of the State, degenerated into the error of regarding consent as historically antecedent to the State and so gave birth to the fallacious doctrine of a Social Contract.

If we are to reason correctly about politics we must disabuse our minds of such prepossessions. A better view would be to think of government or of Sovereignty (if we are to use the word) not as the attribute of a specific person or body of persons, so that we can say "Lo, here is Sovereignty, or Lo, there," but rather as the animating force, which diffused through the State, is the source of its activity. Each individual in his place and in his degree according to his powers of mind and force of character acts upon his surroundings, that is, upon the other units of the social group of which he forms a part. Sovereignty is the sum total, perhaps more correctly the combined result, of individual forces. It is a thing subtle, impalpable, infinitely volatile. In such a tumultuous conflict the forms and instruments of government, the powers of governors, are "like the bubbles on a river, sparkling, bursting, borne away." The rulers of the moment are tolerated, their powers assigned them by the Society to which they belong, which also determines the extent and nature of their functions. But the law of flux is the condition of human institutions. To predicate sovereignty of things so ephemeral and insubstantial is as if one should attribute divinity to the work of men's hands. If the conception of Sovereignty here expressed is correct, it is plain that the Austinian theory cannot stand, nor any definition of law which includes Sovereignty as one of its terms. But the definition of law lies outside the scope of this paper.

R. W. LEE.

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CORRESPONDENCE.

"Costs."

DEAR MR. EDITOR,—

Even while enjoying a very welcome vacation, it seemed quite refreshing to read the ably-written article in the July number of the CANADIAN LAW TIMES on the ever-interesting subject of "Costs," and none the less so because one's views on that subject happen to differ rather widely from those to which the unnamed author has given expression; and in this connection I have thought the following observations might prove acceptable for further consideration.

It may be conceded in the first place that costs are in the nature of "an indemnity for an expense necessarily incurred in enforcing a legal right, or resisting an unfounded claim," and, in the absence of special circumstances, costs do, in fact, follow the event. But it is equally true that the very existence of the discretionary power now and for a long time vested in the Courts in regard to the disposition of the question of costs in all cases, is entirely inconsistent with the suggestion that they should be dealt with on legal principles or as a legal issue purely as this at once means the elimination of all discretion. I am aware that the author does not in terms, go this length, but he does put such a proposition coupled with the words "except in the most flagrant and exceptional cases." (See the concluding lines of the article.) It is quite conceivable that, whatever the proper basis be for the disposition of the question of costs, the cases in which costs should properly be denied the successful party may well be or become so numerous as not to be in any sense "exceptional." What cases, then, would the learned writer deem so "flagrant" as to warrant the exercise of the statutory discretion in question? In other words, what are the circumstances which should be present? The learned author, while attacking in some measure the basis or bases adopted by the judges, does not suggest any other basis, except to say that all such cases should be "flagrant" and "exceptional." How "flagrant"? and how "exceptional"? The good purpose served by the article is, no doubt, to open the way to discussion on an

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important subject, and it may be that the desired result will not be soon realized.

It may be further conceded, that judges, like lawyers, make mistakes, and their errors, no doubt, occur in the exercise of this discretion in pretty much the same proportion as in the disposition of the cases that come before them. But again, the granting of a discretion presupposes a sufficient fund of common sense and capacity in the person to whom it is given, to exercise it *intelligently and in accordance with* the purpose for which it was granted; and to find the reason for which it was granted is to find what should be the governing principle as to its exercise in all cases. Surely no better principle would suggest itself than that a litigant whose conduct towards his opponent has been, *inequitable,* but who has the legal advantage in the action, and, therefore, cannot be penalized in respect to its subject matter, may nevertheless, *if the judge thinks proper,* be penalized in respect to his costs. What other reason can there be? The legislature knows that the judge is the person best able to mete out practical justice in the case, and as a rule there is some material reason why he deprives a party of his costs. Sometimes, indeed, one might well surmise that the professed reason is not the real reason in the judge's mind, but that again is sometimes due to his desire in very mercy to the litigant to refrain from giving a certain degree of publicity to the facts which constitute the real reason itself. It has been well said that "money talks," and when one finds his fingers burned, as it were, as a result of some act or omission or course of conduct on his part, in some way uncommendable, the effect on himself and his future dealings is often more practical and lasting than many sermons, even including under this latter head the many terrifying admonitions that so frequently issue from the Bench itself and constitute, for the time being, the fear and dread of all, save, perhaps, that hardened and impregnable class of gentlemen known as "members of the Inner Bar" and commonly called K.C.'s.

A short time ago, one of my learned friends of the Toronto Bar appeared before His Honour Judge Denton in support of a motion for particulars, and the motion was granted. Then the following dialogue occurred:—

Counsel: Costs to the plaintiff, of course, your Honour?

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His Honour: When was the demand for particulars served?

Counsel: I did not serve a demand for particulars.

His Honour: Why not?

Counsel: Because the present rules don't require it.

His Honour: Quite true, but, although the rules don't require it, it has an important bearing on the question of costs, and where a demand has not been made I will not allow costs.

No doubt, if this gentleman had served a demand for particulars they would have been forthcoming, and at any rate he could still have moved, but the judge could readily see that the other method was chosen for the purpose of making costs, and he was equally aware that the procedure was not created for the purpose of making costs, but only when necessary for the purpose of getting particulars, the costs being merely incidental.

When we consider the many actions which, though sufficiently within the letter of the law to succeed are nevertheless vindictive, frivolous, vexatious, harsh, and in the moral sense, even unprincipled, we are surely bound to agree that, however faulty the exercise of this discretionary power at times, its very existence is a stay to many an unnecessary proceeding, and it would be a sorry day for the people and a long step backwards, if the provision under discussion were repealed or if the Courts were even hampered in its administration by legislation attempting to limit or define their power, as, the moment we put into writing what shall and shall not entitle the judge to exercise his discretion, it becomes a comparatively simple matter for some, more gifted in invention than either your humble servant or the author of the said article, to bring themselves within the letter of what would amount to an imperfect definition at best, and so render the discretion, as such, a nullity, and it is to be devoutly hoped that we shall never witness any such abuse of the present power as will occasion further legislation of this kind.

Yours very truly,

ARTHUR A. MACDONALD.

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CURRENT COMMENTARY UPON ENGLISH AND CANADIAN DECISIONS.

ENGLISH DECISIONS.

In our last issue we had to notice a decision of the Court of Criminal Appeal (*Rex* v. *Light, supra,* p. 620), upon the subject of attempting to obtain money under false pretences, viz., that it is not an essential element in the offence that the mind of the prosecutor shall have been affected by the false pretences. Now we have to notice another decision of the same Court on the same subject, namely *The King* v. *Robinson,*[1] to the effect that a person cannot be convicted of an attempt to obtain money by false pretences, unless he made the false pretence to the person from whom the money was intended to be obtained, or to his agent; a false pretence made to a third person, although intended to be ultimately reported to the person from whom the money was to be obtained, will not suffice. The appellant who had insured his stock in trade with certain underwriters at Lloyds, had falsely reported to the police that a burglary had taken place on his premises, in the hope that the police would make a report by which the insurers might be induced to pay. Lord Reading, C.J., says (p. 348): "The real difficulty lies in the fact that there is no evidence of any act done by the appellant in the nature of a false pretence which ever reached the minds of the underwriters, though they were the persons who were to be induced to part with the money. . . The police were not acting on behalf of the underwriters. In truth what the appellant did was preparation for the commission of a crime, not a step in the commission of it. . . But there must be some act beyond mere preparation if a person is to be charged with an attempt."

Railway Company — Contract of Carriage — "Owner's Risk."—Gunyon v. *Southeastern and Chatham Railway Companies Managing Committee,*[2] is a decision of a Divisional Court on appeal from a County Court, that if a railway company enters into a contract of carriage, in this case of cherries, with a provision that in consideration of being charged a reduced rate, the consignor relieved it "from all liability for

[1] [1915] 2 K. B. 342; 84 L. J. K. B. 1149.
[2] [1915] 2 K. B. 370.

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. . . delay . . . except upon proof that such . . . delay . . . arose from wilful misconduct on the part of its servants," . . . it must not depart from an essential term of the contract, if it wishes to retain the benefit of the above clause. If it does so it is no longer performing the contract and the goods will no longer be carried at the owner's risk. In other words the company will not be relieved from liability under the above clause. The grounds on which the Court proceeded, and what happened in this case, are clearly shewn in the following passage from the judgment of Sankey, J., (p. 378):

> "In my view the present contract was a contract for carriage of perishable merchandise by passenger train. The whole basis of the contract was the condition that the goods should be so carried. When the cherries were put into a goods train an entirely different mode of conveyance was substituted for that stipulated for, to which different rates and different conditions were applicable. The defendants from that moment departed from the agreement into which they had entered and substituted for it another one to which the exceptions for which they had contracted did not apply. I do not think that where a railway company has promised to perform the conveyance in a certain manner, with an attendant right to take advantage of certain stipulations made in their favour, they can put upon the consignor a mode of conveyance which he has not contracted for, and yet retain in their own favour the stipulations referable to the agreed mode of conveyance only. The result is that in this case the defendants were not entitled to rely upon the conditions in the consignment note, and the appeal must be allowed with costs."

Sale of Goods—Outbreak of War while Contract still Executory—Effect of War on Contract.—Arnhold Karberg & Co. v. *Blythe, Green, Jourdain & Co.*,[3] consisted of two special cases stated by arbitrators on the same form of contract, and raised a question of general importance, namely: Whether when, before the outbreak of war, goods had been sold by one English firm to another on a c. i. f.,[4] contract and shipped on a German ship to a neutral port, the seller after the outbreak of war was entitled to tender, in one case the German bill of

[3] [1915] 2 K. B. 379.

[4] "Cost, insurance, freight." A. c.i.f. contract signifies one under which there is included in the price of the goods all charges to the port of destination.

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lading, in the other case the German bill of lading and a German policy of insurance, and claim the price.

Scrutton, J., held that he was not. The facts concisely stated were as follows: Two contracts for the sale of beans to be shipped from Chinese ports to Naples and Rotterdam respectively each contained a provision that payment was to be in net cash in London on arrival of the goods at port of discharge in exchange for bills of lading and policies of insurance, but payment was to be made in no case later than three months from date of bills of lading or upon the posting of the vessel at Lloyd's as a total loss. The beans were shipped in July, 1914, on German vessels which on the outbreak of war between England and Germany on August 4th, 1914, entered ports of refuge in the East, where they remained. At the expiration of three months from the date of the bills of lading the sellers tendered to the buyers the shipping documents, in one case a German bill of lading and an English policy of insurance, and in the other a German bill of lading and a German policy of insurance. The buyers in each case refused to accept the tender and pay the price.

We have not space to go into all the details of the case, but Scrutton, J., states the grounds on which he holds that the buyers were entitled so to do in the following passage of the judgment (p. 391):

> "When the seller in this case tendered documents" (namely, the bills of lading and German policy of insurance) "he tendered documents which had been contracts, but which were now, by considerations of public policy, void and unenforceable as regards any obligations of performance which would but for the war have been carried out after August 4th. To carry out their original obligations would involve entering into contractual relations with the King's enemies; and those relations were now impossible either in England or Germany, the countries of the original contracting parties."

Reinsurance (Marine) — Compromise between Original Assured and Original Insurers—Liability of Re-insurers — British Dominion General Insurance Co. v. *Duder*,[5] is a decision of the Court of Appeal upon a question on which Pickford, L.J., says (p. 404), there was no direct authority. The plaintiffs had insured a ship against total or constructive total loss. The insured claimed a constructive total loss, and

[5] [1915] 2 K. B. 394.

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though the plaintiffs disputed that there had been one, they ultimately compromised for 66 per cent. of the claim. They had re-insured the ship for a like amount as their own risk, with the defendants, and the latter having refused to join in the above compromise, the plaintiffs now sued them on the policy of in re-insurance, and having proved that there had been a constructive total loss, claimed to recover 100 per cent. of the loss, and not merely 66 per cent. They succeeded on this claim at the trial, but the Court of Appeal reversed this decision. They held that a contract of re-insurance is a contract of indemnity; that the defendants were entitled to the benefit of the compromise made with the owner; and that, therefore, the plaintiffs were only entitled to recover from the defendants 66 per cent., and not 100 per cent. of the loss together with a proper proportion of the expense of obtaining the compromise. All the judges concurred, holding, as Bankes, L.J., puts it, (p. 409), that "it is not possible, without losing sight altogether of the root principle of insurance law that the contract of insurance is a contract of indemnity, to accept the respondent's contention that they are entitled to ignore the compromise and claim the full amount of the re-insurance policies."

It is important to notice the way *In re Eddystone Marine Insurance Co.*,[6] and *In re Law Guarantee Trust and Accident Society*,[7] were distinguished. These were cases where the original insuring company went into liquidation and either paid nothing or only a dividend on the original policy, and were held nevertheless entitled to recover the full amount from their re-insurers. Buckley, L.J., thus points out the distinction, at p. 403:

> "They are cases in which the assurer by way of bankruptcy or liquidation seems to discharge his liability by payment of a dividend to the original assured. This, however, is not the fact. Notwithstanding the payment of a dividend, the liability to the full extent remains, and out of further assets, if any, it must in law be discharged. When the estate pays only 10s. in the pound and recovers 20s. in the pound, it is not recovering in excess of a sum for which it has compromised its liability. The liability is not compromised at less than 20s. in the pound. The liability is still 20s. in the pound, and the right to recover a like sum against the re-insuring underwriter is an

[6] [1892] 2 Ch. 423.
[7] [1914] 2 Ch. 617.

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asset of the estate, and its proceeds must go according to the law of bankruptcy or liquidation to all the creditors in administration."

Criminal Law—Duty of Judge to Direct Jury on Questions Arising out of Evidence, Although not Relied Upon by Counsel.—The King v. *Hopper.*[8] On the trial of Hopper for murder, his counsel relied substantially on the defence that the fatality which had occurred was the result of accident, though he indicated that in the event of the jury not accepting that view, he would ask them to find manslaughter, and not murder. The ground of this appeal to the Court of Criminal Appeal was that the trial judge in his direction to the jury told them that they must either find a verdict of murder or acquit the prisoner; in other words he told them that if they did not accept the theory put forward by the defence that the killing was accidental, there was no alternative open to them but to find a verdict of murder. The Court, as they had power to do under the provisions of the Criminal Appeal Act, 1907, entered a verdict of manslaughter, which they held the jury might, on the evidence, have found if they had been directed upon the point. The value of the case is to be found in the following passage of the judgment which was delivered by Lord Reading, C.J. (p. 435):

"We do not assent to the suggestion that as the defence throughout the trial was accident, the judge was justified in not putting the question as to manslaughter. Whatever the line of defence adopted by counsel at the trial of a prisoner, we are of opinion that it is for the judge to put such questions as appear to him properly to arise upon the evidence, even although counsel may not have raised some question himself. In this case it may be that the difficulty of presenting the alternative defences of accident and manslaughter may have actuated counsel in saying very little about manslaughter, but if we come to the conclusion, as we do, that there was some evidence—we say no more than that—upon which a question ought to have been left to the jury as to the crime being manslaughter only, we think that this verdict of murder cannot stand."

We may add the further short extract:—

"In a Court of Justice it is for the Court, with the assistance of the jury, to arrive at the true view of the

[8] [1915] 2 K. B. 431.

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facts without paying too much attention to whether a particular witness is called by one side or the other."

Action for a Declaration Where no Cause of Action Exists. —*Guaranty Trust Co.* v. *Hannay & Co.*,[9] is a decision of the Court of Appeal upon the scope of Imp. Order XXV., r. 5, which is identical with section 16 (*b*) of our Judicature Act, and provides that:—

> 'No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief is or could be claimed or not.'

Two out of the three judges agree that under this the Court has power to make a declaration at the instance of a plaintiff though he has no cause of action against the defendant, but the declaration which he asks is merely that he is not liable in a possible action the defendant might bring against him, at all events if, as in this case, he asks for relief in the form of an injunction restraining the defendant from further prosecuting such an action already commenced by him in a foreign country. Pickford, L.J., goes the whole length of holding that the Rule is not confined to cases where the plaintiff has a cause of action apart from itself; but gives a general power to make a declaration whether there is a cause of action or not, at the instance of a party interested in the subject matter of the declaration. He observes, however, that a declaration that a person is not liable in an existing or possible action is one which will hardly ever be made, though it is not beyond the power of the Court in a very exceptional case to make such a declaration. Bankes, L.J., does not go quite so far as this. He agrees that an application for a declaration is not to be refused merely because the applicant cannot establish a legal cause of action; but he holds that the Rule applies where a person is seeking 'relief,' or in whom a right to 'relief' is alleged to exist; and points out that 'relief' is not confined to relief in respect of a cause of action; and that the claim for the injunction was a claim for relief to which the claim for the declaration was merely ancillary.

Buckley, L.J., dissented, holding that a declaration can only be made under the Rule where it is founded on facts

[9] [1915] 2 K. B. 536.

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which, if true, show a cause of action; that the Rule does not authorise a declaration as to the plaintiff's obligation, where the cause of action is in the defendant and not in the plaintiff; and that the declaration claimed in the case before the Court did not lead to, or bear upon, the injunction, which was an entirely separate matter. He says, p. 549:

> "The declaration authorised is a 'declaration of right'—that is, of the plaintiff's right—'whether any consequential relief is or could be claimed or not? It does not authorise a declaration of obligation. Where the cause of action is in the defendant, and not in the plaintiff, the declaration which the plaintiff seeks is a declaration, not of any right of his, but a declaration that his obligation is not that which the defendant alleges."

Banker and Customer—Account at one Branch—Demand of Payment at Another Branch.—Clare and Co. v. *Dresdner Bank*,[10] is a decision of Rowlatt, J., upon a point which he says "seems never to have been raised before, probably because such a thing has never been dreamed." The point decided is that if a man has an account with a branch of a bank in a foreign country, he cannot demand payment upon a branch of the bank in England, without any previous request to the former to pay, or to remit the balance to credit, to the English branch, for "there is no obligation on a bank to pay in one country a debt due to a customer on current account in another country." *Leader and Co.* v. *Direction der Disconto-Gesellschaft*,[11] is distinguished because there there had been a request to the bank abroad, where the amount was kept, to remit the money to its London branch. Rowlatt, J., while admitting that the relation of banker and customer is simply that of debtor and creditor, with a superadded obligation to honour cheques, says (p. 578):—

> "It seems to me that locality is an essential part of the debt owing by a banker to his customer, and that his obligation to pay is limited to the place where the account is kept. As a rule, no doubt, a debtor has to seek out his creditor and pay him; but in the case of a bank with several branches that cannot be the true relation of the parties. Money has a different value in different parts of the world even although it may be expressed in the same currency, and I cannot conceive it possible that a man who has, we will say, £1,000 sterling to his credit at

[10] [1915] 2 K. B. 576.
[11] 31 Ti. L. R. 83.

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a bank in New Zealand, on coming to London could have the legal right to demand payment of £1,000 at an office of the same bank in London without being liable to pay anything in consideration of that convenience or even to give time for the bank in London to ascertain whether he was in fact a customer of and had a credit balance at a branch in New Zealand."

Foreign Judgment—Jurisdiction of Foreign Court—Conditional Appearance.—In *Harris* v. *Taylor*,[12] we have another decision, this time of the Court of Appeal, "the precise point" in which, according to Bankes, L.J., (p. 590) "does not seem to have arisen for decision previously." That point is this: If you are served with process of a foreign Court, and enter a conditional appearance, and then apply unsuccessfully to the foreign Court to set aside its order for service out of its jurisdiction and the writ, on the ground that you are domiciled abroad, is this a voluntary submission on your part to the jurisdiction of the foreign Court, so that a judgment subsequently obtained in it against you in your absence, can be enforced by action against in your own country, although in fact the foreign Court would otherwise have had no jurisdiction? The Court of Appeal say the answer is, yes. All three judges agree. It will be sufficient to quote from Buckley, C.J., (at p. 587):

"When the defendant was served with the process he had the alternative of doing nothing. He was not subject to the jurisdiction of the Court, and if he had done nothing, although the Court might have given judgment against him, the judgment could not have been enforced against him unless he had some property within the jurisdiction of the Court. But the defendant was not content to do nothing; he did something which he was not obliged to do, but which, I take it, he thought it was in his interest to do. He went to the Court and contended that the Court had no jurisdiction over him. The Court, however, decided against this contention and held that the defendant was amenable to its jurisdiction. In my opinion there was a voluntary appearance by the defendant in the Isle of Man Court and a submission by him to the jurisdiction of that Court. If the decision of the Court on that occasion had been in his favour he would have taken advantage of it; as the decision was against him, he was bound by it, and it became his duty to appear in the action,

[12] [1915] 2 K. B. 580.

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and as he chose not to appear and to defend the action he must abide by the consequences which follow from his not having done so."

Company—Mortgages—Unregistered Mortgage—Notice.—The June *Law Reports* are remarkable for the number of cases of first impression which they contain. We have already noticed more than one. Another is *In re Monolithic Building Co., Tacon* v. *The Company,*[13] which decides a point which Cozens-Hardy, M.R., says (p. 66) "has never been authoritatively decided before." The Court of Appeal unanimously decide in it that sec. 93 of the Imp. Companies (Consolidation) Act, 1908, which in terms very similar to sections of the British Columbia and Yukon Companies Acts, enacts that 'every mortgage or charge created . . by a company . . . and being either . . (*d*) a mortgage or charge on any land, wherever situate, or any interest therein . . . shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator or any creditor of the company, unless the prescribed particulars of the mortgage or charge . . . are delivered to . . . the Registrar for registration . . . within 21 days after . . . its creation . . .' avoids an unregistered mortgage against a subsequent registered incumbrancer *even though he had express notice of the prior mortgage at the time when he took his own security.* They proceed upon the principles enunciated in *Edwards* v. *Edwards,*[14] and especially refer to the words of Mellish, L.J.:

"If the legislature says that a deed shall be 'null and void to all intents and purposes whatsoever,' how can a Court of Equity say that in certain circumstances it shall be valid? The Courts of Equity have given relief on equitable grounds from provisions in old Acts of parliament, but this has not been done in the case of modern Acts, which are framed with a view to equitable as well as legal doctrines."

Cozens-Hardy, M.R., says (p. 667):

"If a deed is said to be void against the first and second incumbrancer, what is added by saying that it shall be void to all intents and purposes? Of course the deed is not void to all intents and purposes. It is a perfectly good deed against the company so long as it is a going

[13] [1915] 1 Ch. 643; 84 L. J. P. C. 441.
[14] 2 Ch. D. 291, 297.

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concern. It is not void to all intents and purposes, but it is void as between the two incumbrancers."

So Phillimore, L.J., says (p. 667):

"We have to construe s. 93 of the statute. It makes void a security, and not as against everybody, not as against the company grantor, but against the liquidator, and against any creditor, and it leaves the security to stand as against the company while it is a going concern. It does not make the security binding on the liquidator as successor of the company. There are three ways in which documents, or three degrees to which instruments, may be void. They may be void altogether, like a bill of sale under £30 under the Bills of Sale Act, 1882, they may be void as to the security and good as to the obligation; and they may be void against certain parties only; but in each of those cases they are quoad a particular transaction void, and the matter is not made stronger by saying 'to all intents and purposes' or any phrase of that kind."

Will—Declaration that Trustee Shall Decide any Question of Disputed Identity of Legatee — Public Policy. — In re *Raven, Spencer* v. *National Association,*[15] is a decision of Warrington, J., the nature of which cannot be better given than by the following extract from his judgment (p. 676):

"The testator bequeathed certain charitable legacies and amongst them a legacy of £1,000, to the 'National Association for the Prevention of Consumption.' He then inserts this direction: 'If any doubt shall arise in any case as to the identity of the institution intended to benefit, the question shall be decided by my trustees, whose decision shall be final and binding on all parties.' It is said that in this case a doubt has arisen whether the legacy in question ought to be given to one institution or another. The trustees desire to decide the question finally if they have power so to do . . . In my opinion it is not competent for a testator to confer certain legal rights by giving legacies and at the same time to say that the question whether that legal right is or is not to be enjoyed is not to be determined by the ordinary tribunal—in other words, it is not competent for him to deprive the person to whom that legal right is given of one of the incidents of that legal right; and, if necessary, I should be prepared to rest my decision upon the ground that the attempt to do so is an attempt to do two inconsistent things. In my opinion, the gift of a legacy to a legatee,

[15] [1915] 1 Ch. 673; 84 L. J. Ch. 489.

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even if it be of doubtful construction, is in fact a gift to the person who shall be determined to be the legatee according to legal principles, and to give effect to a provision such as the provision which the testator has inserted in his will in the present case is in fact to assert the direct contrary. . . . But I also think that I may and ought to decide it on wider grounds, namely, that it is contrary to public policy to attempt to deprive persons of this right of resorting to the ordinary tribunals for the purpose of establishing their legal rights."

And he refers, as a decision upon the precise point, to the Irish case of *Massy* v. *Rogers*.[16]

Company—Appointment of Receiver and Manager—Leave for Manager to Disregard a Contract of the Company.—In re Great Cobar, Limited, Beeson v. *The Company*.[17] The company was formed in 1906 for the purpose of acquiring and working certain gold, copper, and coal mines in New South Wales. The plaintiff, a debenture holder, had obtained the usual order in a debenture-holders' action, and a receiver and manager of the assets of the company was appointed. The plaintiff now, with the acquiescence of the company, applied before Warrington, J., for an order that the receiver and manager might be at liberty to disregard a certain agreement which the company had entered into in 1906, before the issue of the debentures, with a certain firm that it should be the sole agent of the company for the sale of copper and silver from the company's mines on certain terms as to commission. The debentures were subsequently issued in the ordinary form of a charge on the undertaking of the company, but were in no way made subject to the performance of the agreement. The assets of the company were shewn to be insufficient to satisfy the claims of the debenture-holders, and the goodwill of the company's business was of no value. Warrington, J., made the order as asked upon the following grounds (p. 689):

"This agreement in no way affects the value of the goodwill of the business. There is no obligation on the receiver that I can see, morally or otherwise, to carry the agreement into effect. He is appointed to manage the business of the company, and it is for him to determine through what agents and generally in what way the produce of the company's mines should be sold. I think, therefore, I must make an order in accordance with the

[16] 11 L. R. Ir. 409, 416, 417.
[17] [1915] 1 Ch. 682.

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application that the receiver be at liberty to disregard the agreement."

Company—Articles of Association—Their Effect as a Contract between the Company and its Members.—Hickman v. *Kent or Romney Marsh Sheepbreeders' Association,*[18] is the last case which seems to call for notice, and that for the benefit of those of our readers who belong to British Columbia, Nova Scotia, Alberta, Saskatchewan, and the Yukon Territory, whose Company Acts incorporate by memorandum and articles of association, and contain a like clause to that which came in question in this case, before Astbury, J., namely:

> 'The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member, his heirs, executors and administrators, to observe all the provisions of the memorandum and the articles subject to the provisions of the Act.'

Astbury, J., carefully reviews the apparently conflicting decisions and dicta on this section, and arrives at the conclusion (pp. 897, 900) that this much is clear from them:

> (i) that no article can constitute a contract between the company and a third person, whether such third person is, or subsequently becomes, a member or not. Such an outsider to whom rights purport to be given by the articles, in his capacity as such outsider, whether he is, or subsequently becomes, a member or not, cannot sue on those articles, treating them as contracts between himself and the company to enforce those rights;
>
> (ii) no right, merely purporting to be given by an article to a person, whether a member or not, in a capacity other than that of a member, as, e.g., as solicitor, promoter, director, can be enforced against the company;
>
> (iii) articles regulating the rights and obligations of the members generally as such do create rights and obligations between them and the company respectively.

Thus, holding that an article providing for the reference of disputes to arbitration is a sufficient admission in writing within the Arbitration Act, he granted an application by the company that all further proceedings in an action commenced against the company by a member be stayed, and that the matters in question in the action be referred to arbitration in accordance with the provisions of the article.

[18] [1915] 1 Ch. 881.

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CANADIAN DECISIONS.

Judgment against Agent—Bar to Action against Principal—Final Order.—M. Brennan & Sons Mfg. Co. Ltd. v. *Thompson,*[1] shews the unwisdom of unthinkingly rushing ahead to sign a default judgment. The plaintiffs sued the three defendants for lumber sold. Two were undisclosed principals and the third, T., had ordered the goods. The writ was specially endorsed and claimed against all three without making a distinction as to principal or agent. T., the agent, did not appear and judgment for the whole claim was entered against him. The other two defendants appeared. The plaintiffs then realized the predicament they were in and moved to set aside the judgment against T. This was done by the County Court judge. The Appellate Division held that this order was "final" in its nature though in form it might be interlocutory, and that therefore an appeal lay; and set aside the judgment of the County Court judge. The case is valuable for a clear statement of the different principles applicable in the two kinds of cases of this nature. The first is where A. represents himself to be the agent of B.; the second where he makes no such representation, but is agent (or thought to be agent) for an undisclosed principal. In the second case a judgment against either is a bar to a judgment against the other because there is only one contract or cause of action: a contract for goods sold and delivered. "The contract *transit in rem judicatam,* and is merged, gone." The contract against the agent cannot then be set aside without the consent of the principal. There is no relief on the ground of mistake. The plaintiff has made his election. In the first case, there are two different causes of action: one against the principal in contract (in which case there will be no cause of action against the agent); and one against the alleged agent if in fact he were not agent, in tort, or on special counts in contract. Here likewise judgment against one will be held to bar an action against the other. The reason, however, is not that there was one contract which is now represented by a judgment; but that having succeeded in one action on alleging and proving a certain set of facts, the plaintiff will not be heard to allege a set of facts directly the reverse. He can

[1] (1915) 33 O. L. R. 465.

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only succeed against the principal if there was in fact agency; he can only succeed against the ostensible agent if in fact there was no principal, and the so-called agent misrepresented the facts. In this class of case there is room for mistake where a default judgment has been entered; for it is a question of fact, not of election and merger of the contract in a judgment.

"Guardian of an Infant" — Ditches and Watercourses Act."—Healy v. *Ross,*[2] is a decision of the Appellate Division reversing the judgment of Middleton, J., in 32 O. L. R. 184. Section 8 of the Ditches and Watercourses Act, R. S. O. 1897, c. 285 (now s. 8 of R. S. O. 1914, c. 260) provides that notice in writing shall be served upon "the owners or occupants of the . . . lands to be affected by a proposed scheme"; and section 2 (*j*) defines "owner" as *inter alia,* "the guardian of an infant owner." Notice was served for two lots on William Johnston the elder; it being assumed that he owned both lots. At the statutory meeting the engineer was informed that the son, William Johnston the younger, aet. 17, owned one of the lots. The engineer verbally informed the son that proceedings were being taken, but no fresh notices were served on anyone. An infant can have more guardians than one; he may have a guardian of his person and one of his estate. As William Johnston the elder was not the guardian of the infant's estate, and as this was the guardian intended by the legislature, the notice given was held insufficient, and the whole drainage scheme fell to the ground. The objection was fundamental, as in the case of *McKillop* v. *Township of Logan.*[3]

Passing the lowered gates at a Railway Crossing—Negligence.—Garside v. *Grand Trunk Ry. Co.,*[4] is a case in which a point new to Ontario Courts, though there are American decisions, was taken. The accident took place in the City of London, the deceased having been killed by a yard engine which was backing acrossWellington Street. A freight train was passing at the time. The gates were lowered; but the deceased passed around or under them; and waiting on the

[2] (1915) 33 O. L. R. 368.
[3] (1899) 29 S. C. R. 702.
[4] (1915) 33 O. L. R. 388.

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tracks for the freight train to pass was struck by the yard engine. There was no watchman stationed at the crossing; and the yard engine rang no bell. At the trial judgment was entered for the plaintiff, the jury having negatived contributory negligence. It was argued on appeal that when the gates were lowered the right of the public to use the highway was suspended, and that the deceased in entering on that part of the highway was a trespasser to whom the appellant owed no duty; or that his so entering was in the circumstances of the case, as a matter of law, or *per se,* negligence disentitling the respondent to recover. As the learned Chief Justice of Ontario pointed out when giving judgment and dismissing the appeal, the contentions of the appellant are supported by decisions of the highest Courts in some of the States of the neighbouring republic, but are opposed to the view of the highest Courts of other States. The learned Chief Justice held that the railway company has not the exclusive right of user of the highway when its gates are down, at all events in the case of a Dominion railway, where it is not shewn that the erection and maintenance of the gates is authorised or required by an order or direction of the Board of Railway Commissioners for Canada. Consequently the lowering of the gates is but a warning to persons desiring to cross the tracks that it is dangerous to do so; and the passing of the lowered gates was not *per se* negligence.

Reincorporation of a Company—Land held by Old Company in Trust.—Smith v. *Humbervale Cemetery Co.*,[5] is a decision of the Appellate Division on the effect of reincorporation of a company. The company was incorporated and given power to "take, hold, and convey the land to be used exclusively as a cemetery." Subsequently a majority shareholder wished to dispose of a portion of the lands, the property having increased greatly in value. To obtain power to do this, application was made for reincorporation. See R. S. O. 1914, c. 178, ss. 11-13. The Act provides for the issuing of letters patent extending the powers of the company to such other objects as the applicant may desire; but s. 13 provides that all debts, contracts, liabilities, and duties of such (the old) corporation shall thenceforth attach to the new corporation, and may be enforced against it to the same extent as if such debts, contracts, liabilities, and duties had

[5] (1915) 33 O. L. R. 452.

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been incurred or contracted by it. It was held, reversing the judgment of Britton, J., that it was the plain duty of the former corporation to hold the land upon the trusts declared by the statute. In two of the judgments of the Appellate Division it seems to be assumed that s. 13 overrides and limits the very wide powers conferred on the Provincial Secretary by s. 12, permitting the extending of the powers of the company to such other objects as the applicant may desire. Kelly, J., however, puts the matter differently, and it is submitted preferably: that the removal of the restriction upon selling could only be effected by the clearest and most unequivocal language; that in the absence of such language there was no assumption that the former liability no longer existed; and that therefore the reincorporation did not relieve the new company from the duties and liabilities of the earlier corporation.

Affidavit—Statutory Declaration.—Rex v. *Marshall*,[6] is a decision from British Columbia. It was there held that a statutory declaration expressed to be made under the Canada Evidence Act (1893) and stated in the jurat to be "sworn," is not an "affidavit" within the meaning of the Game Act, B. C. 1914, c. 33, s. 56. The "affidavit" read as follows:

"I, J. B. Marshall, solemnly declare that I have not sold deer meat on or about January 25th, 1915, to any person or persons, and deny the charge. And I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath and by virtue of the Canada Evidence Act, 1893.

"Sworn before me at Mount Olie, this 1st day of June, 1915. J. B. Marshall.

"Alexander Seibel, J.P."

In *Doe d. Britton* v. *Clarke*,[7] Wightman, J., after consulting Denman, C.J., Williams, J., and Coleridge, J., refused to accede to the argument of Sir Fitzroy Kelly and Crompton that the omission of the word "oath" is cured by the jurat "sworn before me, etc.," following *Oliver* v. *Price*.[8] *Allen* v. *Taylor*,[9] and *In re Newton*,[10] are decisions to the same effect. Consequently the appeal, based as it was on this "affidavit," was dismissed.

[6] (1915) 31 W. L. R. 702.
[7] (1842) 12 L. J. Q. B. 69.
[8] 3 Dowl. P. C. 261.
[9] (1870) L. R. 10 Eq. 52.
[10] (1860) 2 DeG. F. & J. 3.

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SUPREME COURT OF CANADA.

SASK.] [MARCH 15TH, 1915.

LINDE CANADIAN REFRIGERATOR COMPANY v. SASKATCHEWAN CREAMERY COMPANY.

Present:—SIR CHARLES FITZPATRICK, C.J., and IDINGTON, DUFF, ANGLIN and BRODEUR, JJ.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Company—Dominion corporation—Provincial registration — Juristic disability—Right of action—Contract—Carrying on business within province—Legislative jurisdiction—R. S. Sask., 1909, c. 73, ss. 3, 10—Costs.

A company, having its chief place of business in the Province of Quebec and incorporated under the Dominion statute with power to trade and carry on its business throughout the Dominion of Canada, did not comply with the provisions of the "Foreign Companies Act," R. S. Sask., 1909, ch. 73, requiring registration previous to carrying on business within the Province of Saskatchewan. In the ordinary course of its business, it sold and brought certain machinery into the province, and did the work of installing it there, for a price which included setting it up and starting it working. An action for the contract price was dismissed by the judgment of the trial court (6 West. W. R. 1159), and this judgment was affirmed by the Supreme Court of Saskatchewan, on the ground that the unregistered extra-provincial company was denied the right of action in the courts of the province by the tenth section of the "Foreign Companies Act."

On appeal to the Supreme Court of Canada, the judgment appealed from (7 West. W. R. 89), was reversed.

Per IDINGTON, J.—The mere setting up and starting the working of the machinery by the extra-provincial company did not constitute the carrying on of business in the Province of Saskatchewan within the meaning of the "Foreign Companies Act."

Per ANGLIN, J.—The installation of the plant was a substantial part of the consideration of the contract and, consequently, the unregistered extra-provincial company was denied the right of enforcing its claim by action in the Courts of the province under the provisions of the tenth section of the "Foreign Companies Act," but, inasmuch as the legislation in question had the effect of depriving the extra-provincial company of the status, capacities and powers which were the natural and logical consequences of its incorporation by the Dominion Government, it is *ultra vires* of the provincial legislature and

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inoperative for the purpose of depriving the company of its right to maintain the action in the provincial courts. *John Deere Plow Co.* v. *Wharton* [1915], A. C. 330, applied.

Costs were refused the appellant, on allowance of the appeal, for failure to comply with rule 30 of the Supreme Court of Canada in respect of the printing of statutes regarding which questions were raised.

Appeal allowed without costs.

Atwater, K. C., for appellants.

The respondents were not represented at the hearing of the appeal.

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CONTEMPORARY LEGAL REVIEWS AND PERIODICALS.

The July number of *The Journal of the Society of Comparative Legislation* is a mine of information and of learning. We don't think we have ever seen an issue of a legal periodical of which this might more truly be said. Our Sir James Aikins holds the place of honour with a photograph and a short biographical sketch. Then come two appreciations of the late Lord Justice Kennedy. Sir Courtenay Ilbert says of him:—

> "It was the international aspect of law that attracted him most—the aspect which is reached by a comparative study of different systems. He always sought, he never wearied of seeking, he never despaired of finding the immutable and fundamental principles of law which underlie differences of history, race, creed and country. Faith in the possibility of discovering and establishing these principles permeates all his work."

There follow no less than nineteen separate articles on various subjects; notes of certain recent decisions (a new feature) in England, Canada, Australia, South Africa, and India; short reviews of fifteen new publications; and the usual concluding Notes *de omnibus rebus et quibusdam aliis* of interest to lawyers. We must, in passing, dissent from the statement on p. 242, that the Privy Council decision in the John Deere Plow Co. case decided that the Dominion parliament could incorporate companies under its power to legislate for the regulation of trade and commerce.

It is obviously impossible even to notice the names of all the subjects dealt with in this remarkable number, no less than eight of the articles dealing with questions of international law, or the law of war. Amongst these is pre-eminently worthy of special notice a very perfect production in the form of a sketch of the life and works of Franciscus a Vitoria (1480-1546) by Mr. Coleman Phillipson. Vitoria, we are told, for we don't wish to conceal our ignorance, was the earliest noteworthy representative of that group of Spanish scholars—

> "who, endowed with logical acumen, legal spirit, remarkable impartiality, and signal independence of opinion, analyse some of the fundamental questions of international

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law, extend its field of inquiry, fearlessly investigate the jurisdiction of the Pope, the arrogant claims of contemporary sovereigns relying on the might of the sword, condemn the unrestrained barbarities of warfare and propose regulations for combatants, determine the essential character of a society of states, define the rights and obligations of the constituent members with regard to each other and also to barbarian communities. Thus they stimulate the judicial consciousness of nations, and prepare them for the recognition and acceptance of an enlarged body of international law."

The great merit of Mr. Phillipson's article, in our humble opinion, lies in the lucid and complete, though concise, statement which he gives of the contents of the actual writings of Vitoria, and the principles and arguments advanced therein. We would also select for special mention a careful article by Mr. Edwards on *Common Law Naturalisation and Expatriation;* a timely and useful article by Mr. G. G. Phillimore on *Contraband of War;* and a long and painstaking article by Mr. Samuel Rosenbaum of the University of Pennsylvania, on *Rule-making in the Courts of the Empire,* wherein the writer states that—

"The rule-making system developed by the English Parliament for the regulation of civil procedure was an experiment in legislation which has met with unbounded success. Not only has it been the opening wedge for an ever-increasing delegation of quasi-legislative powers to executive and judicial authorities (thus relieving Parliament of a multitude of statutory details), but it has been copied in the judicial system of practically every law-making unit in the widespread British Empire. Its general adoption shows that it has the merit, not only of making procedure flexible and responsive wherever it is in force, but also of being suited to the most widely divergent local conditions. . . . The rule-making powers now reposed in the Courts have laid for ever the ghost of technicality; procedure is now no longer a game or mystery, and throughout the Empire "reality has been given to the legal rights of individuals."

In our *Current Commentary on Cases* in this issue we have referred to a recent case of *The King* v. *Hopper,* in which the Court of Criminal Appeal holds that whatever may be the line of defence adopted by counsel for a prisoner

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at the trial, the judge is bound to put to the jury such questions as appear to him properly to arise upon the evidence, even though involving some point which counsel may not himself have raised. *The* (English) *Law Journal* for July 10th observes that the recent bride drowning case in England raised the question whether a judge at a criminal trial is entitled to suggest to the jury a theory of guilt which has not been put forward by the prosecution. Mr. Marshall Hall, K.C., it appears, protested against Mr. Justice Scrutton making a new suggestion as to the method in which the brides were drowned; but, the *Law Journal* says, precedent does not support his protest. It then tells the following story:—

> "At the trial of a gang of card-sharpers, over which Chief Justice Jervis présided, a pack of cards was produced, which even the detectives had to declare to be a perfectly fair one. The Chief Justice, one of the keenest men that ever sat on the Bench, scrutinized the cards narrowly, but said nothing until he addressed the jury. 'Gentlemen,' he said, 'I will engage to tell you, without looking at their faces, the name of every card in the pack.' He had discovered on the back of every card, which was figured with flowers, one small flower in the right-hand corner with a number of tell-tale dots."

The *Law Journal* of July 17th contains another interesting little paragraph with reference to a case which came before the Court of Appeal the week before of *Neville* v. *Dominion of Canada News Co.* In it Pickford, L.J., emphatically endorsed the view of the judge in the court appealed from (Atkin, J.), that, "for a newspaper company to stipulate for a consideration that it will refrain from commenting upon fraudulent schemes, when it is the ordinary business of the company to comment upon fraudulent schemes, is in itself a stipulation which is quite contrary to public policy, and which cannot be enforced in a court of law." As the *Law Journal* remarks, this is an important extension of the doctrine of public policy. To agreements to do that which it is the policy of the law (or of the State) to discourage, we must now add: "Agreements *to refrain from* doing that which it is the policy of the law (or of the State) to encourage." The *Law Journal* says:—

> "In the case under consideration, the proprietors of the newspaper had agreed for an advance of money not to

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comment on a land company, of which the plaintiff was a director, or on any of its capital investments, with a provision that a certain proportion of the advances was not to be called in so long as the agreement was observed. It was because of alleged breaches of this honourable understanding that the plaintiff now claimed repayment of his advances, but Mr. Justice Atkin held, and the Court of Appeal confirmed his view, that, the agreement being invalid, there had in law been no breach of contract by the defendants and the events had not happened upon which the advances became repayable under the agreement. In this indirect way, the superior claims of a free press over freedom of contract were established, and the interest of the public in the preservation of the journalistic 'right to defame'—in proper cases, of course—was triumphantly vindicated."

In an Article on *Cotton as Contraband* the *Law Journal* for July 24th observes:—

"Why, it is asked, does the Government hesitate to add to the list of contraband one of the chief ingredients of shells and ammunition? The legal answer is not difficult to find. Cotton is not an article exclusively or principally used for war, even in the present circumstances, and, according to the rule of the Declaration of London—enunciating the principle of the older law—it is only such articles that may be proclaimed absolute contraband. It would not help, on the other hand, to put cotton in the list of conditional contraband, because an apparently good neutral destination might always be supplied for consignments which would cover a market between the neutral and the enemy country. But if there is some legal objection to the inclusion of cotton in the category of absolute contraband, it is questionable whether the consideration of national policy should not prevail over it, on the ground that at this moment, *Salus reipublicæ suprema lex.* The United States Government has already declared that it will not respect the decision of the English Prize Courts given under the Retaliatory Order in Council, so far as they are not consistent with international law; and, therefore, we should hardly be in a worse position in relation to the United States if, following the precedent of the Federal States in the great Civil War, we boldly stated that we would treat all cotton as a forbidden commodity, unless it were proved to have an innocent destination. In order to prevent cotton reaching the

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enemy, we have, anyhow, to develop the law, and any development short of a new and thorough revision of the list of contraband is likely to be ineffective."

The Law Quarterly Review for July, apart from its usual excellent "Notes" on recent cases, does not contain so much as usual of interest to the practitioner. After a long Article by Mr. J. G. Pease on *Market Overt in the City of London,* and another, in French, on *Alien Enemies and Their Position in Regard to the Exercise of Their Civil Rights,* by Ch. de Visscher, we get a short Article by Mr. Courtney Kenny, on the recent decision of the Court of Criminal Appeal in *Rex* v. *Ahlers.*[1] There the Court appears to have decided that, though a treasonable act be done, and done with treasonable intent, yet the doer's guilt may be affected by considerations as to his purpose—that ulterior consequence of his act which he contemplates and desires, and which is the motive that induces him to act. Mr. Kenny evidently regards this as a departure from the long-established principle of English criminal law that a man is answerable for the probable consequence of his act, as much as if it were his actual object. Sir Frederick Pollock adds a note that the argument that "mens rea" is requisite for a conviction has been used without success in a case decided by the same Court where the offence was trading with the enemy: *Rex* v. *Kupfer;*[2] and leaves the learned reader to reconcile the reasoning in the two cases if he can. Mr. Samuel Rosenbaum, who we have seen has expatiated at great length, in the *Journal of Comparative Legislation,* upon *Rule-Making in the Courts of the Empire,* follows with an Article on *Rule-making in the County Courts.* Then came Articles on *Interest on 'Hotchpot' Advances* by Mr. Walter Strachan; on *The St. John Peerage Claim* by Mr. W. Paley Baildon; and on *Traces of a Township Moot* by Mr. Adolphus Ballard. The number concludes with an interesting Notice of the new edition of *Dicey's Law of the Constitution* by Mr. H. J. Randall, who says of that brilliant work:

"Any review, in the ordinary sense, would be an impertinence, because it ranks among the greatest law books produced in England in the nineteenth century. We do not know to what extent it is read by the general public,

[1] [1915] 1 K. B. 616.
[2] [1915] 2 K. B. 321, 340.

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but its main ideas have permeated legal and political theory, and are ordinarily used, without acknowledgment or reference, as part of the curent coin of such thought, understanded of all people. It is above everything a legal work, written by a lawyer for lawyers, and its profound handling of the legal aspects of the Constitution is its special mark of distinction, as compared with the works of the numerous political theorists, such as Bagehot, Hearn, Lord Courtney, and Mr. Sidney Low."

Mr. Randall confines his attention to what is the distinguishing feature of this final edition, the introduction of nearly ninety pages, 'whereof the aim is to compare our Constitution as it stood and worked in 1884 with the Constitution as it now stands in 1914.' There are three comments of Mr. Randall which we note with special interest. The first is on Mr. Dicey's remark that the Parliament Act, 1911,—under which it will be remembered a Bill passed in the Commons in three successive sessions is presented for the Royal assent despite the House of Lords—enables a majority of the House of Commons to resist or overrule the will of the electors, or in other words, of the nation. Mr. Randall says:

"As to the majority of the House of Commons overriding the will of the nation, there is no denying that this will be possible, but we are inclined to think that if this does happen, the tacit convention that a subsequent Parliament does not repeal the Acts passed by its predecessor will become a thing of the past. So long as democratic government remains a reality, the 'general will' is likely to prevail in the end."

The second is where Mr. Randall says:

"We venture to think that the widespread distrust of parliamentary institutions, the lessening respect for law, passive resistance, the demand for a business government, and so forth, are all symptomatic of a general protest, as yet but faintly articulate, against the tyranny of the machine. But there has been a concurrent movement (*sc.* to the tightening of party bonds since 1884) that must not be lost sight of. The thirty years since the first publication of Professor Dicey's Lectures have witnessed a marked tendency to separate governmental matters from the strife of party, and to confine that to proposals for legislation. Since Lord Rosebery's tenure of office from

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1892 to 1894, foreign affairs have been treated as definitely non-party, and similarly the army, the navy, the India Office, and to a considerable extent, the other executive departments, have been placed in the same category."

Lastly, we welcome, and, if we may be allowed to say so, heartily concur in Mr. Randall's remarks in reference to that part of his introduction in which Mr. Dicey deals with 'The Characteristics of Federal Government in Relation to Imperial Federation.' Mr. Randall says:—

"There is one historical point that the framers of such schemes should especially remember. It may perhaps be expressed thus,—that the loosening of the legal bonds that bind the Dominions to the mother country has proceeded concurrently with the strengthening of the political and sentimental ties. In the middle of the nineteenth century, Parliament not only claimed to, but did actually, legislate for the Dominions in a way that would never be seriously contemplated at present, but as the exercise of the legal powers has gradually faded into obscurity, what may be called the contractual and consensual co-operation—colonial conferences, consultation on matters of policy, participation in Imperial defence, and the like—has grown apace. Again, the initiative towards co-operation has come more and more strongly from over the seas."

Finally we have in this issue of the *Law Quarterly Review* a short Article on the late Professor John Chipman Gray, with special reference to his writings, by Mr. Charles Sweet. From this we will cull the following paragraph:—

"To see Gray at his best, we must turn to his delightful little Socratic dialogue on future interests in personal property (which appeared some years ago in the *Harvard Law Review*, and is printed in one of the appendices to the Rule against Perpetuities), or to his essay on *The Nature and Sources of the Law*. Its learning, the charms of its literary style, and the acuteness of the author's reasoning combine to make this a most attractive book, and an admirable cure for mental dyspepsia, caused by swallowing the crude and innutritious theories to be found in Austin and the writers of his school."

In a footnote, Sir Frederick Pollock says that he wholly agrees with Mr. Sweet's high estimate of *The Nature and Sources of the Law*.

A. H. F. L.

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The first Article in this month's *American Law Review* is by Jacob Trilber on *The National Employer's Liability Act;* an Act which with the Safety Appliance Acts is intended to protect those employed in railroad transportation by imposing on the employer the duty of exercising a higher degree of diligence in the management of the roads than was required by the common law. The power under which Congress passed this law was 'To regulate commerce with foreign nations, and among the several States and with the Indian tribes.' The second is a remarkable paper, entitled *A Lesson in Equity,* contributed by Mr. Robert H. Rogers of Waco, Texas. After quoting Aristotle, Story, and Bacon, the learned writer refers to Mr. Bispham's work. But Story's conception of Equity, as well as the system spoken of by Mr. Bispham, "is nevertheless pregnant with more than one error as applied to the equity of the early chancellors in the exercise of their extraordinary jurisdiction." "Story, like the great majority of the earlier lawyers who wrote on this subject, seems never to have appreciated the truth expressed by King Ahasuerus in the words: 'The writing which is written in the king's name, and sealed with the king's ring, may no man reverse.'" The rest of the Article is concerned with chancellors and seals and rings. "But there never was a time as far back as history goes when kings did not have rings. . . . When Pharaoh took off his ring from his hand and put it upon Joseph's hand . . . he made him the keeper of his seal." Story's fault it seems lay in not making use of his authorities. "Fond as he is of ancient authorities he entirely overlooks the Bible, from which we get first information as to the powers of him who has the use of the king's seal," and so on. Mr. E. A. McCulloch contributes a clear paper on *Hugh Cairns, Lord Chancellor of England.* The career of that very eminent lawyer is treated in an interesting way. We are reminded of his parliamentary life, and of the "frozen oratory" for which he was celebrated; and are told about the leading members of the bar in his day, Sir Roundell Palmer (afterwards Lord Chancellor Selborne), Mr. Mellish, Sir John Rolt, and a little later Sir George Jessel. Mr. O. C. Semple writes on *Issue of Securities by Public Service Corporations for Refunding of Debts and Reimbursement of Income Expenditures,* and Mr. O. L. Waller on *Right of State to Regulate Distribution of Water Rights.*

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Several of the English periodicals notice the recent decision of the Divisional Court in *Williams* v. *Moss Empires Limited.*[1] *The Solicitors' Journal and Weekly Reporter* of June 19th writes on the topic of *Novation of Written Contracts,* and *The Law Times* of June 12th has an Article on *Parol Variation of Contracts within the Statute of Frauds.* In both Articles the earlier cases are referred to: *Cuff* v. *Penn,*[2] *Goss* v. *Nugent,*[3] *Stead* v. *Dawber,*[4] *Price* v. *Dyer,*[5] *Stowell* v. *Robinson,*[6] *Giraud* v. *Richmond,*[7] *Sanderson* v. *Groves,*[8] *Marshall* v. *Lynn,*[9] *Moore* v. *Campbell,*[10] *Noble* v. *Ward,*[11] and *Vesey* v. *Rashleigh.*[12] The effect of the decisions in so far as they are pertinent to the points involved in *Williams* v. *Moss Empires Limited* are summed up in *The Law Times,* as follows:—Where the agreement is within the Statute of Frauds, and has been reduced to writing, and there has been a subsequent variation by parol, it is incorrect to say that there is only one contract, and that the variation may be regarded as a substituted performance not affecting the contract itself. In such case there are two contracts. It is difficult to say whether the slightest variation makes a new contract. Probably it does though the line will have to be drawn somewhere. If the new contract is invalid for want of writing there is no implied rescission of the original one; but the original contract may be expressly rescinded verbally; and if the new contract be valid, as not falling within the statute, the old contract is rescinded and the new one takes its place.

The current numbers of *The Law Times* contain the following papers: June 19th, *Articles of Association, How far Binding on a Company,* in which the case discussed is *Hickman* v. *Kent or Romney Marsh Sheep Breeders' Association.*[13] This decision of Mr. Justice Astbury, says *The Law Times,* would seem at last to settle the law, and the result

[1] (1915) 139 L. T. 93.
[2] 1 M. & S. 21.
[3] 5 B. & Ad. 58.
[4] 10 A. & E. 57.
[5] 17 Ves. 363.
[6] 3 Bing. 928.
[7] 1 C. B. 835.
[8] L. R. 10 Ex. 254.
[9] 6 M. & W. 109.
[10] 10 Ex. 323.
[11] L. R. 2 Ex. 135.
[12] [1904] 1 Ch. 634.
[13] 138 L. T. Jl. 540.

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is that ordinary articles of association are binding as between the company and the members, as well as between the members *inter se;* June 26th, *Permission to Deviate from Trusts;* July 3rd, *Covenants for Title;* July 10th, *Resulting Trusts;* July 17th, *Rights of Minorities of Shareholders in Companies;* and July 24th, *Executors and Compromises,* and *Investment of Infants' Legacies.*

In *The South African Law Journal* for May 14th, S. B. Kitchin continues his Article on *The Effect of War on Contracts.* The first instalment dealt with contracts between alien enemies and others. This instalment illustrates the rules laid down in the first instalment, and briefly discusses the effect of the war on contracts to which the parties are either citizens or neutrals. The rules in South Africa are the same as those in the other portions of the Empire not under Roman-Dutch law. All the recent English decisions are noted, including *Leader, Plunkett & Leader* v. *Direction der Discontagesellschaft,*[14] which has since been reversed. Contracts to which citizens or neutrals are parties are treated under the headings *Impossibility of Performance, Legal Impossibility* and *Principal and Agent.* Other articles are *Sale by Auction in Holland* and *Parate Execution.*

The Solicitors' Journal and Weekly Reporter for June 12th has a paper on *The Jurisdiction in Divorce.* The cause of the paper is the overruling by the Court of Appeal of the case of *Dickinson* v. *Dickinson,*[15] where it will be remembered Sir Samuel Evans granted a decree of nullity on the ground of the wilful refusal to consummate. It was thought at the time that that case carried the law a step further than precedents warranted. Now *Napier* v. *Napier*[16] declares *Dickinson* v. *Dickinson* bad law; and the jurisdiction is again limited to cases where there is incapacity to consummate.

The coming of age of the Prince of Wales is made the occasion of a paper on *Nonage and Some of its Incidents* by the same journal, June 26th; and the application of a private relator for a *Quo warranto* information directed against Sir Edward Speyer and Sir Ernest Cassel to question the

[14] 31 L. T. 83.
[15] [1913] P. 198.
[16] Times, June 7th, 1915.

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right of naturalized British subjects to become members of His Majesty's Privy Council gives us a paper on *Quo Warranto Informations* in the issue of July 3rd.

The *Irish Law Times* for June 19th contains a note on the *Responsibility of a Master for the Wilful Misstatement of his Servant*, the most recent case being *Department of Agriculture and Technical Instruction* v. *Burke* [17]; and for July 3rd on *Requisitions on Title as to the Debts of a Deceased.*

In *The Australian Law Times* for June 26th we note a discussion of the cases on *Sale of Reversions at an Undervalue.*

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[17] (1915) 2 I. R. 128.

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NEW BOOKS AND NEW EDITIONS.

A selection of Leading Cases on various branches of the law with notes. By John William Smith. The twelfth edition by Thomas Willes Chitty, John Herbert Williams, LL.M., and Walter Hussey Griffith, M.A., in two volumes. Vol. 1, 1915: London: Sweet and Maxwell, Limited: Toronto, The Carswell Co., Ltd.

Smith's Leading Cases is a book which needs no commendation. It is perhaps the best known English text-book after Blackstone. It is sufficient to welcome a new edition published this year.

In the present edition the editors have thought that the work will be improved and made more generally useful by the omission of some more of the old cases and the introduction of some new ones. Accordingly they have eliminated *Crepps* v. *Durden,* which dealt with proceedings before justices, but necessarily at insufficient length; *Bickerdike* v. *Bollman* (notice of dishonour), which has ceased to be of use since the Bills of Exchange Act, 1882, and *Horn* v. *Baker,* on the subject of possession, order, and disposition in case of bankruptcy, which is more adequately treated in special treatises on the law of bankruptcy. In the place of these cases they have brought in *Indermaur* v. *Dames* and *Hadley* v. *Baxendale,* both of which have long attained the rank of leading cases.

Carnegie Endowment for International Peace. Division of international law. The Hague Conventions and Declarations of 1899 and 1907, accompanied by Tables of Signatures, Ratifications and Adhesions of the Various Powers, and Texts of Reservations. Edited by James Brown Scott, director. New York, Oxford University Press.

This is a very handsome and useful production of the International Law Division of the Carnegie Endowment for International Peace. In view of the very great interest at the present time in the Conventions and signed Declarations of the First and Second Hague Conferences, and because of the need of accurate information as to ratifications of and adhesions to the Conventions and Declarations relating to war, the Endowment prepared a series of pamphlets in order that the public might learn from reliable sources the status of these international agreements and the extent to which the powers at war are bound by their provisions. These pamphlets have now been brought together and issued in this

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volume, to which there have been added introductory matter and a carefully prepared and elaborate index.

In order that the reader may have a clear idea of the origin and nature of the Hague Conferences, some remarks of a general nature are prefixed, and some documents relating to the call, the nature, and the scope of the Conferences have been printed by way of introduction.

The provisions of the final Acts of the first and second Hague Peace Conferences of 1899 and 1907 respectively are printed in parallel columns in excellent type and spacious clearness, to the great advantage of the student.

The American Journal of International Law. A Quarterly. Volume 9. Number 2. April, 1915. Published for The American Society of International Law. by Baker. Voorhis & Company, New York; and Supplement.

We have devoted a special review to these publications in our present issues, in which we hope we have paid adequate tribute to their value and to the interest and merit of the Articles contained in them.

We have also received the following:—

'British and German Ideals. The meaning of the war.' These are Articles reprinted from the numbers of the "Round Table" for September and March last. As all our readers know, the Round Table is a quarterly review of the politics of the British Empire and stands as high as, if not higher than, any other periodical dealing with similar matters. As will be seen by the contents of the present reprint, the Round Table construes the expression "The politics of the British Empire" in the broadest possible way. Those contents are:—The Schism of Europe; Germany and the Prussian Spirit; and the Austro-Serbian Dispute. These Articles are already so famous and well known that it would be a work of supererogation on our part to say anything further about them.

Fourth Annual Report on Labour Organization in Canada for 1914, published by the Department of Labour at Ottawa.

Express Statistics of the Dominion of Canada for the year ending June 13th, 1914, by A. W. Campbell, Deputy Minister of the Department of Railways and Canals, printed by order of Parliament, Ottawa. This is the report of the Comptroller of Statistics in relation to the operations of Express Companies in the Dominion of Canada.

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Ninth Report of the Board of Railway Commissioners for Canada for the year ending March 31st, 1914. Printed by order of Parliament, Ottawa.

Dominion of Canada Report of the Departmment of Trade and Commerce for the fiscal year ended March 31st, 1914. Part VII. Trade of British and Foreign Countries. Printed by order of Parliament, Ottawa.

Calendar of the Faculty of Law of Dalhousie University. Halifax, Nova Scotia, 1915-6.

We note that the curriculum treats of law mainly on its practical side, but includes Constitutional Law and Constitutional History, and International Law. The Faculty is a very strong one, including not less than three judges of the Supreme Court, and two County Court judges. The Dean, Dr. A. MacRae, at one time practised law in Toronto as a member of the late Mr. Bicknell's firm. The degree conferred is Bachelor of Laws; and the Nova Scotia Barristers' Society exempts from its Intermediate and Final Examinations the holder of that degree, but requires that the examinations passed by the student must have included one on Procedure and Practice.

Calendar of the School of Law of King's College. Windsor, Nova Scotia, 1914-5.

The Dean of the Law Faculty of King's College, Windsor, is well-known to the readers of the CANADIAN LAW TIMES, and contributes a brilliant Article in this present number. The degree conferred is Bachelor of Civil Law. The curriculum though mainly devoted to practical law, includes, also, Constitutional History and Law, and Roman Law. The school may be congratulated upon not allowing its cult of the practical to banish Roman Law, the study of which not only introduces the student to the fundamental conceptions of the Civil Law, prevailing in Quebec, and practically all over Europe, except England and Ireland, but, from the acute analytical tendencies of the Roman lawyer, has much of the advantages of a study of Analytical Jurisprudence. We notice that under the local Attorneys Act, those students who have obtained the degree of Bachelor of Civil Law are thereupon entitled to be admitted as Attorneys without further examination.

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THE GAZETTES.

The Canada Gazette for July 3rd, contains a Dominion Order in Council respecting Section 19 and Appendix A of the Canadian Rules and Regulations governing the examination of masters and mates of coasting and inland vessels, and containing new regulations respecting sight tests.

It also contains an Order-in-Council of June 19th last providing that the time during which an entrant on Dominion lands within the Railway Belt of British Columbia is absent from his homestead, whether he be an alien or a British subject by birth or naturalization, who has been serving or is now serving, or who may hereafter serve as a member of any military force or regiment of Great Britain, or of the Allies of Great Britain in the present war, and also a period not exceeding three months after his discharge as a member of such force or regiment, may be counted as residence spent on his homestead within the meaning of the regulations; while if he is disabled by wounds or illness during such service from resuming occupation and completing the conditions of entry, the Minister may forthwith issue letters patent for the homestead in his favour.

It also contains an Order-in-Council of June 19th last amending the regulations for the leasing and administration of Dominion lands containing limestone, granite, marble, gypsum, marl, gravel, clay, sand, or any building stone.

The Canada Gazette for July 10th contains an Order-in-Council of June 26th last, containing regulations creating a calorific standard for the determination of the heating value of manufactured gas throughout the Dominion.

Also an Order-in-Council of June 19th last, containing amended Regulations for the use of Motor Vehicles in the Rocky Mountains Park.

Also an Order-in-Council of the same date that Penticton, in British Columbia, shall be henceforth established as an Outpost of Customs and a Warehousing Port, under the survey of the Port of Greenwood, B.C.

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The Canada Gazette of July 17th records the Royal approval of the grant of the Victoria Cross to Captain Francis Alexander Caron Scrimger, of the Canadian Army Medical Service, 14th Battalion Royal Montreal Regiment; and to Colour-Sergeant Frederick William Hall, 8th Canadian Battalion.

The Canada Gazette of July 24th contains an Order-in-Council of July 16, amending sections 3, 5, 6, 7, 15, 20, 22 and 23 of the Miners' Lien Ordinance pursuant to section 8 of the Yukon Territory Act.

The Ontario Gazette of June 26th last contains a provincial Order-in-Council directing that all instruments affecting land in that part of the City of Toronto which formerly constituted the City of West Toronto shall from August 1st, 1915, be registered in the Registry Office of the Registry Division of West Toronto.

The British Columbia Gazette of June 17th contains a provincial Order-in-Council changing the name of the "City of Fort George" to the "City of Prince George."

The Manitoba Gazette of July 10th contains a proclamation further proroguing the legislature to August 19th.

The Alberta Gazette of July 15th contains the appointment of Arthur Allan Carpenter, Judge of the District Court at Calgary, as a Commissioner to make enquiry into the promotion, incorporation, management and operation of the companies incorporated under the provincial Companies Ordinance with the object of acquiring, working, or selling of mining properties, and into the operation and management of the various stock exchanges in the province, including the expenses of management, investment of funds, nature of properties or claims held, the manner and cost of any sale or other disposal of stock and other allied questions.

The same issue also contains some new rules of Court, and a tariff of solicitors' costs on proceedings on sale or foreclosure of mortgages under the Land Titles Act; and allowing for all proceedings before a Judge or the Court of Appeal the same fees as would be allowed by the tariff of costs of the Supreme Court for similar services.

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The British Columbia Gazette of July 29th contains a despatch of the Secretary of State, dated June 24th, 1915, containing information for the guidance of persons desiring to record (a) debts (including bank balances) due to British subjects from persons residing in enemy countries; (b) other property in enemy countries (including securities) belonging to British subjects; and explaining that a Foreign Claims Office has been set up at the Foreign Office for the purpose of dealing with all claims for the settlement of which no satisfactory machinery has existed hitherto, and which are foreign in the sense that they are claims by British subjects against a foreign Government or by foreign nationals against His Majesty's Government.

The Manitoba Gazette of July 31st contains a number of regulations of the Provincial Board of Health, approved by Order-in-Council, governing the plumbing, heating and lighting and ventilation, and sanitary equipment and condition of hotels, lodging houses, boarding houses, and stopping places, and providing for the periodical inspection of all such places.

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WITNESS TOO MUCH FOR LAWYER.

"Did he hit you in the poolroom or in the backyard?" asked Crown Prosecutor Hannesson, of the complainant witness, a Swede named Nelson.

"Val, ay say he hit me in the eye," said the Swede.

"Yes, I know, but what location or position were you in when you were struck?"

"Ay ain't got no position, or no job either."

"I don't care whether you have or not. I want to know whether it was outside or inside you were struck."

"Val, outside of course."

"Outside of what?"

"Outside of me."

The lawyer was desperate. "Now listen to me," he shouted. "Where were you when he struck you?"

The Scandinavian was buried in deep thought. The Court waited patiently. A pin-drop would have sounded like an explosion. Nelson looked at the prosecuting attorney and slowly said:

"Val, ay was on my back."

Mr. Hannesson gave up. Magistrate Macdonald sighed. Constable Samson, Court officer, swallowed his tobacco.

The case was one of assault in which Fred. Orr, a bartender at the National Hotel, was charged in the city Police Court this morning with beating up Nelson. Orr was found guilty and fined $20 and costs.—Winnipeg Telegram, July 13th, 1915.

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LOCAL AND PERSONAL.

Robert E. Harris, K.C., of Halifax, has been appointed to the Supreme Court of Nova Scotia.

Charles S. McInnes, K.C., of Toronto, has taken over the duties of assistant adjutant-general at headquarters in Ottawa, being anxious to serve in some capacity during the war, and above the limit of age for active service at the front.

Lieutenant G. C. Thomson, formerly police magistrate and a leading barrister at Swift Current, Sask., is reported dangerously wounded while leading his company in an engagement at the Dardanelles, and now in hospital in Malta.

Mr. E. W. Beatty, chief counsel of the Canadian Pacific Railway Company, has been made a Dominion K.C.; and Mr. J. W. Blair, of the firm of Blair, Laverty, and Hale of Montreal, has been made a provincial K.C.

We have to note with regret that the following deaths are reported among Judges and members of the profession:—

The Honourable Honore A. Gervais, Justice of the Court of Appeal, at Westmount, Montreal, on August 8th inst.

Elie Moreau, of Montreal, on July 5th last.

Lieutenant George R. Kappele, of Toronto, accidentally killed on July 14th last at Toronto, while endeavouring to shoot a bat which had flown into his house. He was a son of the late George Kappele, K.C., and had recently received an appointment with the cavalry battalion formed under Major S. T. Beckett.

William John Code, of Ottawa, on July 24th last, at Ottawa.

William Hoyt Cutten, of Guelph, on July 4th last, at Guelph.

Harry H. Britain, of St. John, N.B., on July 4th last, at St. John.

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The Canadian Law Times.

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BY THE WAY.

The CANADIAN LAW TIMES cordially invites contributions from lawyers all over Canada. If it is desired to thoroughly work up any subject, there are two best ways of doing it, to undertake to lecture upon it, or to write a book, or an Article, upon it. Then we soon find out the weak points in our comprehension and mastery of it. To write Articles in the CANADIAN LAW TIMES is the best way for a young lawyer to advertise his learning and ability, or for an old lawyer to maintain his reputation. Fifthly and to conclude, the CANADIAN LAW TIMES pays its contributors, which is more than many a legal periodical which wouldn't shake hands with it, can say.

The CANADIAN LAW TIMES takes no narrow view of what is material proper to its pages. While it may feel a special appreciation for Articles on technical legal subjects, others on the more abstract and academic side of legal theory, or on matters of governmental administration, or on the history of law, or, for the matter of that, on historical subjects generally, so long as they have some special bearing on law and lawyers, will be heartily welcomed. So, too, will papers on financial and economic subjects. For when questions of finance and economics are to the fore, questions of law are seldom far behind.

Speaking of finance we have to acknowledge the receipt of a new Bank Map of Ontario and Quebec, recently issued by the Department of the Interior at Ottawa. According to the information which has been incorporated in the publication, the number of branches in operation in 1901, the first year for which statistics of this nature are

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given, totalled approximately 500, in comparison with 2,000 at the present time. This interesting compilation of current banking information is valuable also as a railway map showing as it does the location, on the various main and branch lines, of all towns and cities. A copy may be procured free of charge upon application to F. C. C. Lynch, Superintendent of the Railway Lands Branch, Department of the Interior, Ottawa.

The paper upon the *Duel in Early Upper Canada,* by Mr. Justice Riddell, which we publish in our present issue, has already seen the light in the *Journal of the American Institute of Criminal Law and Criminology* for July. We republish it, however, by consent. It is so interesting to Canadians, and especially to Torontonians, that it would be indeed a pity if it were not republished in this country. It depicts an aspect of life in what we may term, not incorrectly, the old colonial days. The duel is gone. But the same courage which their ancestors displayed in the duel, Canadians of to-day are displaying on the far more glorious field of war.

We learn from an Address by Mr. Simeon E. Baldwin, delivered before the American Bar Association at Salt Lake City, Utah, last month, and courteously sent to us, that since July 1st, 1913, Norway has had in force a new method of taxation on beer. It is called the Progressive Class system. The principle upon which it rests is that the rate of taxation should increase in proportion to the amount of alcohol which the beer contains. It is a quarter of a cent a liter for very light beer, two cents for lager or Pilsener, and four cents for bock beer. No beer can be sold of which alcohol constitutes over five and a half per cent.; none is taxed which does not contain at least two and a quarter per cent. The working of the law is said to have been satisfactory. Possibly our own Temperance Societies may find this to contain a useful hint for them.

It does us all good to have our set and pet opinions shaken up from time to time. Probably if there is one thing which most of us regard with complacent satisfaction, it is our British system of parliamentary responsible government, —our Cabinet, with its collective responsibility. But Mr. Ellis Barker, in a letter to the London *Spectator* of July 17th,

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following upon a most interesting Article by him, entitled '*The Secret of Germany's Strength*' in the *Nineteenth Century* for July,—denounces it in an unqualified manner. He says:—

> 'The supreme actual authority in this country is the Cabinet. The Cabinet is composed of a number of men of equal authority, who under the presidency of the Prime Minister, are the supreme administrative and executive factor. No business except one of pure routine can be efficiently managed by a number of men of equal authority, who naturally will differ among themselves. The first condition of administrative efficiency is that there should be, not divided control, but a single control; that there should not be collective responsibility, but individual responsibility. If your excellent paper should jointly be edited by the editors of twelve of the most successful periodicals and dailies, the *Spectator* would probably before long be in the Bankruptcy Court. In my opinion the Cabinet system of government, the government by a number of amateurs, who are collectively responsible, is a survival of revolutionary times which lacks justification for its continued existence. If the Fire Brigade or the Police go on strike, it is natural that amateurs temporarily take their place, but there is no reason why amateurs should continue filling positions which require highly trained technical experts. It is also understandable that at a time of revolution when an absolute King has been overthrown, successful revolutionists are afraid of a single head and entrust government to a revolutionary committee of amateurs. But there is no reason to continue such an unworkable and inefficient system in ordinary times. . . . I see in the English Cabinet merely the survival of a revolutionary committee which has proved its inefficiency at all times and everywhere.'

And so in his Article in the *Nineteenth Century* above referred to, Mr. Barker says:—

> 'A Prime Minister can preserve the unity in the Cabinet and the unity of governmental action only if he possesses the supreme direction of all departments,—if Cabinet Ministers are not his equals but his subordinates,—if the ridiculous fiction of joint responsibility of the Cabinet is abandoned, if the Prime Minister alone is responsible. A Prime Minister cannot unify the great departments and services by acting merely the part of an amiable chairman, at a suburban temperance meeting.'

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Lord Rosebery in a fascinating little monograph on Sir Robert Peel, published some years ago, told us that Sir Robert Peel was the last Prime Minister who attempted to exercise the sort of supervision over all departments of the government which Mr. Barker advocates. He says:—'A Prime Minister who is the senior partner in every department as well as president of the whole, who deals with all the business of government, who inspires and vibrates through every part is almost, if not quite, an impossibility. . . . That it' (*sc.* the Cabinet) 'works well, on the whole, is a tribute less to the institution itself than to the capacity of our race to make any conceivable institution succeed.' In spite of Mr. Barker, probably most of us will consider our British system the best form of government for ordinary times which mankind has yet developed. The root trouble with it, and all other forms of government, is that they have to be worked by men, for lack of supermen; and few men have a sufficiently strong passion within them for wise, just, and orderly government, to make them, on all occasions, rise above mere partyism, opportunism, and the lust of personal aggrandizement. As Mr. Lecky says in his Democracy and Liberty:—

> 'It is absolutely indispensable to the working of the whole machine, that it should be in the hands of honest and trustworthy men, of men determined to subordinate on great occasions their personal and party interests to the interests of the State; imbued with a genuine spirit of compromise and cordially in harmony with the general spirit of the Constitution.'

But if Mr. Barker is not likely to upset our prepossessions in favour of our present system as the best yet evolved for ordinary times, he may enlist more sympathy when he says, as he does,—'Only a system conferring absolute power for the duration of the War can organize the forces of the United Kingdom and of the Empire as a whole.' The old Roman institution of a Dictatorship in times of national peril, *ne Res publica detrimentum capiat,* has attractions, in times like these, even for a people so inured to freedom as the British; and if we are to have it, it will be no great puzzle to find the Dictator. We have been of late in easy sight of possible circumstances under which the pacificist democracies of North America, at any rate, might, if they are to endure, have to cease for a time to be either pacificist or democratic.

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On August 30th last, the British Foreign Office issued the following statement:—

'Judgments recently have been delivered by the German prize court at Hamburg in the cases of the steamships Maria and Batavier V. The Maria, a Dutch vessel, was carrying a cargo of wheat shipped from Portland, Oregon, to Belfast and Dublin. She was captured and sunk by the Karlsruhe (a German cruiser) in the Atlantic on September 21st. The Batavier V., a Dutch vessel, bound for London, was captured in the North Sea on March 18th and taken to Zeebrugge on suspicion of carrying contraband.

'The sinking of the Maria was justified by the German prize court on the ground that, having regard for the place of capture, the commander of the Karlsruhe was unable to take the vessel into a German port or a port of an allied power, and so acted pursuant to article 113 of the German naval prize regulations. This was said not to require any further explanation and payment of indemnity to the owner was refused.

'The judgments shew that in considering the question of destination of conditional contraband the German prize court held that it is to be guided by a communication of the chief of the general staff of the navy, addressed to the court on August 17th, 1914, concerning ports to be regarded as fortified places or as bases of operations and supply for the British armed forces in Great Britain, issued by 'supreme command.' As the court in other cases held that such places as Ipswich, Poole, Barrow-in-Furness and Grangemouth are bases or fortified places, it may be inferred that these are included in the list referred to.

'In order to rebut the presumption thus set up that conditional contraband destined for such places is intended for military and not for civil use, the court held that counter proof must satisfy the most rigorous conditions. It would only be possible to furnish it in rare cases. With regard to the cargo of wheat aboard the Maria they held that there was no means of ascertaining with the least certainty what use the wheat would have been put to on the arrival of the vessel at Belfast, and whether the British Government would not come upon the scene as a purchaser.

'The effect of these decisions appears to be to abolish in practice the distinction of absolute and conditional contraband of war.'

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THE DUEL IN EARLY UPPER CANADA.

That part of British America which was to become Upper Canada was, before the termination of the American Revolutionary War, almost uninhabited. At the close of that War, a considerable immigration took place [1] of those who had taken the part of the Crown in that conflict, United Empire Loyalists as they were called, driven out with what they considered injustice and what was certainly cruelty by their quondam brethren.

These settlers brought with them their English law and their customs; and although in theory French Canadian law was in force till 1792, the practice was in many cases far different.

Along with other customs imported, was duelling; and this was not at all diminished by the circumstance that many of those placed in positions of authority, when in 1792 the province was incorporated, were Englishmen who had come from across the Atlantic to make a new home in the wilds of Upper Canada.

The civil law of England was formally introduced into Upper Canada in 1792; the criminal law of England had always been in force in all Canada from the time of the Conquest in 1759-60.

By the law of England, and therefore of Canada, a deliberate duel was unlawful—as Blackstone sententiously puts it: 'where both parties meet avowedly with an intent to murder, thinking it their duty as gentlemen, and claiming as their right to wanton with their own lives and those of their fellow creatures, without any warrant or authority from any power either divine or human, but in direct contradiction to the laws of God and man . . . the law has justly fixed the crime and punishment of murder on them and on their seconds also.' [2] And such was the law laid down by Sir Matthew Hale, "as correct, as learned and as humane a judge as ever graced a bench of justice." [3]

[1] Nearly all the immigrants settled near the banks of the international rivers—on the left bank of the St. Lawrence were three main nuclei, at what are now Cornwall, Brockville and Kingston; on the Niagara was Newark, now Niagara-on-the-Lake. On the Detroit River, the loyalists remained to a great extent at Detroit until it passed out of British hands in 1796: then many, but by no means all, crossed the river.

[2] Blackstone's Commentaries, vol. IV., p. 199.

[3] Hale's Pleas of the Crown, vol. I., p. 452.

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While this was undoubtedly the law, it was in our early days not applied very vigorously. There was the "unwritten law" that if the duel was fair in all respects, the survivor and the seconds should not be convicted. Accordingly, although the law was always laid down accurately by the presiding judge, the Crown Counsel, if the duel was a fair one, never pressed for a conviction; and the jury knew what was expected of them.

There were three—or perhaps four—duels which made considerable noise in their day and are not yet quite forgotten.

In 1800, January 3rd, John White, the first Attorney-General of the province, and John Small, the Clerk of the Executive Council, met behind the Government Buildings,[4] in a grove on Palace (now Front) Street at the foot of what is now Berkeley Street, Toronto,[5] and White received a wound above the right hip which proved fatal in a very short time.

White was an English Barrister who, being appointed Attorney-General of the new province, came to Upper Canada with the first Chief Justice Osgoode. He was elected member of the first House of Assembly, representing the Riding of Leeds and Frontenac, but was not re-elected. He was a diligent, painstaking official, but apparently was unable to keep out of trouble: *e.g.*, in 1799, he had to apply to the Court of King's Bench for protection against Captain William Fitzgerald of the Queen's Rangers, who had threatened him and challenged him to a duel.[6] But he was not always to be so fortunate; he spoke slightingly of the wife of Major John Small, and, failing to withdraw his imputations, he was challenged and shot by Small.

Major Small was an Englishman from Cirencester who came to Canada as Clerk of the Executive Council: he afterwards became Clerk of the Crown and Pleas. He survived till 1832, filling his official position with much credit.

White was buried in his garden on his own lot in York (Toronto) east of Sherbourne Street and near Bloor Street.

[4] These were the original public buildings, destroyed by the American troops in 1813. It was in retaliation for this and similar acts of gratuitous vandalism that the American Capitol was destroyed (in part) by the British troops.

[5] The streets running south toward the bay at that time went to the edge of the water; it was not till the Grand Trunk Railway came through, in the 50's, that the Esplanade was constructed.

[6] This appears from the Manuscript Term Books of the Court of King's Bench (commencing in 1794) still preserved at Osgoode Hall, Toronto.

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In 1871, his bones were turned up by labourers digging out building sand and were reverently deposited in St. James' Cemetery by Mr. Clarke Gamble, Q.C.

Small was the ancestor of the well-known and highly esteemed Toronto family of that name. He seems to have acted in all respects in the manner the rules of honour of his times demanded of a gentleman.

He was tried for murder, January 20th, 1800, at York (Toronto) before Mr. Justice Allcock and a jury; and, the duel being a fair one, he was promptly acquitted. The foreman of the jury was William Jarvis, father of Samuel Peters Jarvis, whom we shall meet later on.

Early on the morning of October 10th, 1806, William Weekes and William Dickson, both prominent lawyers, met behind a bastion of old Fort Niagara on the American side, and Weekes received a pistol wound so severe that he died the same evening.

Weekes was an Irishman who late in the eighteenth century came to New York, where he was a follower of the notorious Aaron Burr. Making his way to York, Upper Canada, he was called to the Bar in 1799,[7] and at once obtained a good practice. He joined the well-known judge, Thorpe,[8] in his opposition to the Government of the day and was elected a member of the House of Assembly. Mr. Justice Thorpe presiding at the Court of Assize and Nisi Prius at Niagara (Newark), Weekes in an address as Counsel made a vicious attack on the Government without objection from the Bench—indeed it seems to have been expected by the judge that such an inflammatory address would be made. Weekes was followed by Dickson who made as virulent an attack on Weekes as Weekes had made on the Government.[9] Nothing came of this for a few days, but one night spent by Weekes and the judge together in a neighbouring tavern seems to have developed a plan for the humiliation of Dickson. Weekes was a bachelor without encumbrances; Dickson had

[7] Weekes was the first to be called to the Bar by the Law Society of Upper Canada, who had not been in practice when the Act creating the Law Society came in force; his name was often spelled "Weeks."

[8] As to Mr. Justice Thorpe, see The Journal of the American Inst. of Criminal Law and Criminology, vol. IV., p. 12, May, 1913, where a fairly full account is given of him.

[9] Curiously enough Weekes and Dickson were great friends: in the early part of this year, March 5th, 1806, Dickson was made a "Bencher" or Governor of the Law Society on the motion of Weekes. They were, moreover, of the same stripe of politics, Weekes being by far the more outspoken.

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a wife and a large family of small children; he was moreover a canny Scot; and the conspirators thought he would decline a challenge. Accordingly a challenge was sent; and somewhat to Weekes' dismay it was promptly accepted, with the result we have seen.

Weekes was buried at Niagara. The administration of his very considerable estate was one of the scandals of that early time and was the occasion of one of the earliest private Acts in our Provincial history.

Dickson became a member of the Council and a man of considerable influence in public affairs; he is best known from the part he played in the prosecution—and persecution—of Gourlay.[10] Of course Dickson was not prosecuted for his part in the duel, the crime (?) not being committed in Upper Canada.

The next duel probably caused more stir at the time, and afterwards, than any other similar event in our early history.

In 1815, Mr. Samuel Peters Jarvis went from York to Quebec with his youngest sister to place her in a boarding school there. At the request of Mrs. Thomas Ridout her mother, he also took along Miss Ridout who was to be placed at the same school. On arriving at Quebec he called upon Miss Ridout's brother, Mr. Thomas G. Ridout, an officer in the Commissariat Department who took the young girls under his protection. Ridout was to pay Miss Jarvis' accounts and draw upon her brother for the amount.[11] The following year Mrs. Ridout visited Quebec, and through some misunderstanding got the idea that her son had been obliged to pay for Miss Jarvis' support without reimbursement by Jarvis. She told this to some people and it came to Jarvis' ears. Jarvis wrote to her husband, who was Surveyor General of the Province, demanding a contradiction of the story; he handed the letter to his son George (afterwards Treasurer of the Law Society) who at once wrote Jarvis, saying, "for any imaginary injury received from any part of my family, I am ready to answer." Jarvis demanded an apology or

[10] Robert (Fleming) Gourlay, the "Banished Briton" who was banished from Upper Canada in 1819 largely through the instrumentality of Dickson. His offence was in the main his criticism and defiance of the authorities; the proceedings though frequently attacked as improper and unlawful were in my judgment wholly regular and authorized by the statute law, however unwise they may have been, and, *me judice*, were.

[11] These accounts, or some of them, are still preserved in the Public Library, Toronto, and form interesting reading.

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"meet me with your friend Saturday morning next seven o'clock at the Five Mile Meadow opposite Brown's Point." Ridout accepted "of the terms contained in the latter part of your letter if it be possible to reach the appointed place within the period limited." Accident prevented this duel; another meeting was arranged; but Reverend Dr. Strachan (afterwards the first Anglican Bishop of Toronto), a friend of both parties, succeeded in bringing about an amicable settlement. On November 16th, 1816, both signed a document whereby Jarvis withdrew the letter to the Surveyor General, the elder Ridout; and it was agreed that "a letter shall be immediately written to the Surveyor-General requesting him to give complete contradiction to the reports circulated by Mrs. Ridout to the prejudice of Mr. Jarvis, which it is understood the Surveyor-General is to give." This was done and the trouble blew over for the time.

The hard feelings between the families were not, however, abated. In the following year, John Ridout, a student in the Law Office of his brother George and not quite of age, was conducting a law suit against Jarvis' father, and Jarvis was trying to settle the action. On one occasion Jarvis ordered Ridout out of his office;[12] a few days thereafter the two met on the street; Ridout struck Jarvis several times with a stick and shattered the bones of his right hand. Jarvis knocked him down with a blow from his left, and the fight continued until the parties were separated by Captain Fitz-Gibbon[13] and Dr. Horne.[14] A few days after Mr. James E. Small[15] waited on Jarvis on behalf of Ridout. Jarvis promptly accepted the challenge, and at daylight next morn-

[12] Jarvis claimed that Ridout was unbearably offensive and even insulting—there was no third party present and we have not Ridout's side of the story. No one, however, doubted Jarvis' integrity and sense of honour.

[13] One of the heroes of the war of 1812-14, an Irishman who died a "Poor Knight of Windsor." Many of his descendants still live in Canada.

[14] Robert Charles Horne, an Englishman and a member of the Royal College of Surgeons, was an army surgeon in the war of 1812-14. When his regiment, the Glengarry Light Infantry, disbanded at the close of the war, he came to York (Toronto). It is not quite certain whether he engaged in general practice but he was made Surgeon of the North York Militia. He was appointed a member of the Upper Canada Medical Board to examine candidates for license to practice medicine. At different times, he was editor and publisher of the Upper Canada Gazette, King's Printer, and Cashier of the Bank of Upper Canada. A strong Tory, his house was burned by the Radicals in the short-lived rebellion of 1837-8. He died in 1845.

[15] Son of Major John Small and afterwards Treasurer of the Law Society of Upper Canada.

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ing went with his second, Mr. Henry John Boulton[16] and met Ridout and his second, Small, at Chief Justice Elmsley's barn, not far from the north-west corner of Yonge and College Streets, Toronto. Waiting at the barn until a shower was over, the principals were placed eight yards apart; it was agreed that the signal should be "one, two, three, fire," but that on no account was either party to raise his pistol till the word "fire." Mr. Small pronounced "one," and was in the act of pronouncing "two" when Ridout raised his pistol and fired at Jarvis; he then left the ground in a direction away from Jarvis. Whether this was due to nervousness (as is likely) or not, Jarvis insisted to the end of his life that it was a deliberate attempt at foul play. Ridout was rebuked by his second and directed to take his place. He said: "Yes I will, but give me another pistol;" a loaded pistol was given him, but after a conference between the seconds, taken away later, as "Jarvis was entitled to his shot." The second pronounced the signal agreed upon and Jarvis fired, Ridout fell, was carried into Chief Justice Elmsley's barn and there died in a very short time. The pistols used on this occasion are in the possession of Æmilius Jarvis, Esq., of Toronto, grandson of the surviving principal. They are long and heavy, carry a large bullet, and are most deadly weapons.

Jarvis was arrested the same day and taken to prison, where he remained till the October Assizes at York.

He was arraigned at York before Chief Justice Powell,[17] the Attorney-General, D'Arcy Boulton, receiving permission to retire from the case as his son had been concerned in the matter as second. The Solicitor-General, John Beverley Robinson, was absent; and the judge himself examined the

[16] Afterwards Solicitor-General of Upper Canada, and Chief Justice of Newfoundland. He was a son of Attorney-General (afterward Mr. Justice) Boulton.

[17] William Dummer Powell, born in Boston, Mass., in 1755, was educated there, in England, and on the continent. He took part in the siege of Boston on the Loyalist side but afterwards went to England and studied in the Middle Temple. He came to Canada in 1779, received a license to practice and did practice law in Montreal. Being created First Judge of the Court of Common Pleas for the district of Hesse, he went to Detroit in 1789; when the Court of King's Bench in Upper Canada was organized under the Statute of 1794, he was made the Senior Puisne Justice. He became Chief Justice in 1815 and resigned in 1825 on a pension, dying in 1834. Amongst other services of a public nature, he served as a Commissioner to treat with the American invader when Toronto capitulated in 1813.

Jarvis afterwards married his daughter Mary who had been engaged to the young Attorney-General John Macdonell, who met a hero's death at the battle of Queenston Heights in 1812.

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witnesses. The jury found a verdict of "not guilty" after a few minutes consideration, although the charge "was anything but indulgent to the prisoner and was so considered by most of the persons present in Court."

Small and Boulton, who had been indicted as accessories, were present, and as a matter of course discharged on the verdict acquitting the principal being pronounced.

The unhappy mother whose unguarded words were the beginning of the troubles between the families—"the beginning of strife is as when one letteth out water"—never forgave either principal or second for her son's death; for years she used to wait after the morning service at the door of St. James' Cathedral until Boulton came out and would then solemnly curse him for his part in what she called the murder of her son.[18]

This duel was recalled some years later. Francis Collins, an enthusiastic Irishman of strong Radical leanings, was conducting the 'Canadian Freeman,' a newspaper strongly opposed to the Government. Early in 1828, he made attacks on Henry John Boulton (now become Solicitor-General) in connection with the duel in 1817 in which he had acted as second. A bill of indictment for libel was found against Collins for these publications and he was arrested. Appearing in Court before Mr. Justice Willis[19] he made a violent attack upon the Attorney-General, John Beverley Robinson, for prosecuting him while he took no proceedings against Boulton for "a crime that the law of England calls murder, committed ten or eleven years ago." The judge sent Collins before the Grand Jury, who speedily found a bill against Boulton and Small, the two seconds; they were arrested but admitted to bail. Collins applied for Robert Baldwin[20] to conduct the prosecution, which he did.[21] The trial lasted

[18] *Ex relatione* Sir Glenholme Falconbridge, the present Chief Justice of the King's Bench.

[19] John Walpole Willis, son of the Dr. Willis, in whose care King George III. was put when he was insane, was a Justice of our Court of King's Bench. He fell foul of the Governor and was "amoved" in 1828. Afterwards he became a Judge in Demerara and in New South Wales; from the latter position he was also removed and finally; he survived until 1877. See an article "The Court of King's Bench in Upper Canada, 1824-1827," by the present writer, Canada Law Journal, pp. 126 (1913).

[20] The Honourable Robert Baldwin, an eminent lawyer, but still more eminent for his labours in the cause of responsible government in Upper Canada, the founder and exemplar of the "Baldwin Reformers."

[21] In those days no one could conduct a criminal prosecution but the Attorney-General or Solicitor-General, who derived no small income from that source. Baldwin was specially retained under the circumstances of the case.

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two days and resulted in an acquittal, the jury being out only ten minutes.

The other duel which I propose to speak of was fought in 1833; it is often, but inaccurately,[22] called the last duel in Upper Canada.[23]

About the time of the Jarvis-Ridout duel, there came to the Township of North Sherbrooke (in Lanark County) a number of immigrants generally called the "Radical Settlers." One of them, poor but prominent and influential, was Ebenezer Wilson, who had been a mill-superintendent in Scotland. His oldest son by a second marriage was John Wilson, born in Scotland in 1809, and emigrating with his father.

Young Wilson, when teaching a small school, was brought to the attention of James Boulton,[24] a practising attorney in Perth, who took him into his house, allowing him to pay for his board, etc., by teaching Boulton's little child. He was admitted to the Law Society, Easter Term, 11 George IV, i.e., 1830; another student, Robert Lyon, who had been admitted a year sooner, "Michaelmas Term, 10 George IV, 1829," was in the office of Mr. Thomas Maybee Radenhurst, also in practice in the same town.

Bytown[25] (now Ottawa), at that time was small but of growing importance and had a good deal of legal business. That part of the country had not yet been set off as a District and all the Courts were held at Perth; the Perth lawyers mentioned had branch offices in Bytown and occasionally sent their older clerks to attend to them.

[22] Since the text was written I have been informed by a gentleman, formerly a Postmaster-General of Canada, that two medical men (whose names he gave me) fought a duel with pistols at Bond Head, in the County of York, Upper Canada, in the early 40's (or at least after 1837).

[23] While I cannot lay my hand on any written report, contemporary or otherwise, of a subsequent duel, it is quite certain that at least one of our public men enjoyed the reputation of having fought several duels later than this. It is more or less common report that duelling continued till about the 50's.

Many myths have arisen about the Wilson-Lyon duel; the present account is largely derived from the Chief Justice's notes (still preserved at Osgoode Hall), of the trial of Wilson and Robertson, indicted for murder.

Several other sources of unquestionable reliability have been made use of, and it is believed that the accuracy of the account here given, can be depended on.

[24] Boulton was a man of some prominence in the profession; he afterwards removed from Perth to Niagara, where he practiced for some time.

[25] Called after Colonel By, the British Engineer, who built the Rideau Canal from Ottawa to Kingston.

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The two young men were together in Bytown in 1833, when one day Lyon spoke disparagingly of a young lady of most estimable qualities and high character who was a member of the household of a Mr. Ackland in Perth. Wilson informed Mr. Ackland of this statement in a letter; he mentioned it to several persons and it came at length to the ears of another young lady of whom Lyon was *epris*. This young lady on his return to Perth, treated Lyon coolly, and at length told him of what she had heard. Lyon met Wilson, demanded an explanation, and as Wilson was explaining Lyon knocked him down, calling him a lying scoundrel. On the advice of his friends and much against his own inclination, Wilson challenged Lyon. Wilson's second was Simon F. Robertson, another law student and a fellow student of Lyon's (admitted Trinity Term 1 and 2 Wm. IV, 1831) and Lyon's second was a relative of his, Henry Le Lievre.

On the following day, June 13th, 1833, the parties met in a ploughed field on the right bank of the River Tay under a large elm three and a few feet beyond the dividing line of the Districts. It was raining hard and both missed on the first fire (though Lyon was said to be a crack shot); and Wilson was ready, indeed anxious, to allow the matter then to rest. Le Lievre, however, insisted on another shot. On the second exchange of shots Lyon fell mortally wounded and died in a few minutes on the ground. Le Lievre fled but Wilson and Robertson gave themselves up.

Le Lievre was much the eldest of the party, Lyon was not twenty and Wilson and Robertson but a few years older.

The duel had been fought in the Johnstown District, though all parties resided in the Bathurst District; the two young men were accordingly tried at the ensuing assizes at Brockville on Friday, August 9th, 1833. At that time and until 1841 those accused of felony were not allowed to defend by counsel; the young law students defended themselves and were acquitted.

The presiding judge was Chief Justice Robinson, whose note book is preserved at Osgoode Hall. It is noteworthy that it was proposed to ask the first juror whether he had expressed or did entertain opinions unfavourable to the prisoners. The question was not allowed; our law does not permit such practice. It is very rarely that in our Court it is even suggested, though the proceeding is very common, indeed almost universal, in many of the States of the Union.

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In my own experience of over thirty years, I have heard such a question only once and that by a very young barrister (who never did it again.)[26]

The proceedings at the trial are a perfect example of the course taken in such cases; the presiding judge allowing a mass of testimony to be given explaining the circumstances out of which the duel had arisen, what was said and done by each party, *etc., etc.,* everything which would shew that the prisoner did not wantonly seek a duel; although he carefully notes (and no doubt said at the time) that "it is not evidence."

At the trial it was proved that Wilson detested duelling, but that on being knocked down by the taller, heavier, and more powerful Lyon, he felt himself bound to send a challenge in order "to maintain his standing in society." His master, James Boulton, testified that Wilson was very sensitive as to what was thought to be "his humble origin"—he was the son of a poor farmer—that consequently he "felt it the more necessary to be tenacious of his character and scrupulous about preserving it from taint . . . than if he had been of a higher walk; he would have risked all this and treated it with contempt." Several witnesses swore that, had he not challenged, he would have been exposed to be contemptuously treated by his young companions and others—which gives us a vivid view of society at that time. It seems to have been arranged that Wilson should "explain away the effect of his letter" and Lyon should apologize, but apparently Lyon subsequently refused to implement this agreement.

It is impossible not to recognize from the evidence that Le Lievre was the real author of the mischief. He had been

[26] The proper practice is to challenge for cause and prove prejudice *aliunde.* See *R.* v. *Peter Cook,* 13 St. Tr. 334; *R.* v. *Edmonds* (1821), 4 B. & Ald. 471, 492.

The case referred to was *The Queen* v. *Mrs. Bell,* at the Ottawa Assizes, before Mr. Justice Robertson. I was of Counsel for the Crown and upon the prisoner's counsel desiring to examine the jurymen, I stated to the Court that although the practice was wholly irregular, yet in view of the great newspaper notoriety the case had received and the atrocious character of the crimes charged, I would not object. Mr. Justice Robertson, with great reluctance yielded to the request, upon this consent. No juryman was rejected; the prisoner was convicted and sent to the penitentiary for life. The length of time many American Courts consume in obtaining a jury is a standing marvel to Canadians. I have never seen it take more than half an hour with us.

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very attentive to the maligned young lady[27]; but she had given him his congé and received the addresses of Wilson. When Lyon received the challenge, he stated that he had said what he had to Wilson only to tease him and had not supposed that he would take it seriously. He had asked a Mr. Muir to act as his second, but Muir refused, and he took Le Lievre; then the meeting being postponed until the evening, Lyon refused to carry out the arrangement which had been made, and the parties met about six p.m.

After the first exchange of shots, Dr. Hamilton went forward to the seconds and desired to bring about a reconciliation. Le Lievre at once said a reconciliation was impossible.[28] Dr. Hamilton then desired to speak with Lyon, but Le Lievre said he could not until the pistols were loaded.

[27] She was Miss Elizabeth Hughes, the daughter of the Reverend David H. Hughes, a Unitarian Minister, at one time head master of a classical and mathematical school at Kingsbridge, Devon, England, and afterwards pastor in charge of Vicarage St. Chapel, Yeovil, Somerset. He came with his children, Elizabeth and David John, to Canada in 1832, and died of cholera at Coteau, on his way to the Perth Settlement. Mr. Gideon Ackland, with whom the Hughes family were acquainted, and whose wife kept a school in Perth, took the orphans into his home in that town. Ackland was then a law-student (having entered the Law Society, Mch. Term, 2 Will. IV., 1831); he was admitted an Attorney June 27th, 1836, and called to the Bar June 14th, 1837; he practiced in St. Thomas. Miss Hughes became a teacher in Mrs. Ackland's School, in Perth. The boy, who was only twelve, was adopted by Ackland, and after working for a time as "Printer's Devil" he studied law under Wilson (then become his brother-in-law): was admitted and called August 2nd, 1842. After a successful practice, he became Judge of the County Court of the County of Elgin, at St. Thomas, in 1853: retiring in 1903, after half a century of faithful service, he lived in honour until this present month, dying April 14th, 1915. According to the recollection reduced to writing some years ago, of Mr. Cromwell, a member in 1833, of the household of Ebenezer Wilson, John Wilson was engaged to another young lady; however that may be, he afterward married Elizabeth Hughes, and she survived him, dying in Toronto, February 12th, 1904. She treasured to the last resentment against Lyon, her traducer. I have been informed that meeting a gentleman of that name and family on the street car in Toronto towards the end of her life, she could not conceal her embittered feelings.

[28] While it is reasonably certain that the fatal result of this duel was due to Le Lievre, he acted *secundum artem*.

In the Code settled by the Gentlemen Delegates of Tipperary, Galway, Mayo, Sligo and Roscommon at the Clonmell Summer Assizes, 1775, generally agreed to and followed throughout Ireland and in substance elsewhere, Rule 5 reads as follows:—

'As a blow is strictly prohibited under any circumstances amongst gentlemen, no verbal apology can be received for such an insult: the alternatives therefore are—first the offender handing a cane to the injured party, to be used on his own person, at the same time begging pardon; second, firing on until one or both are disabled; or thirdly, exchanging three shots, and then asking pardon, without the proffer of the cane.'

Lyon had not, of course, taken the first alternative and the firing must necessarily proceed, if the Code was to be adhered to.

See 'Personal Sketches of His Own Times,' by Sir Jonah Barrington, 1830, vol. II., pp. 16, 17.

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Notwithstanding this, he spoke to both principals. Wilson seemed very desirous of settling, but Lyon said it was impossible.

The Chief Justice has written out his charge, which to a lawyer at least is of extraordinary interest. He begins with the serious nature of the duty of judge and jury and warns the jury against being led away by their feelings. He then defines with perfect legal accuracy the nature of the offence charged and the criminality of the duel, but he inserts the significant sentences:—"The practice of private combat has its immediate origin in high example, even of Kings. Juries have not been known to convict when all was fair,[20] yielding to the practices of Society . . . that sometimes no one being present the fact could not be proved at whose hands the party fell, . . . at other (times) they may have felt it difficult to infer that malice aforethought essential to murder." He deals with the facts of the duel and then with the antecedent facts "not as legal evidence but as the only palliative the prisoners could offer and was usually heard." After congratulating the prisoners on being "so capable of defending themselves" when they were prevented by law from addressing the jury by counsel, he adds, "Wilson was of humble origin and saw his prospects blasted if he submitted to the degradation and was impelled by the usages of Society and the slights he had partially felt or foresaw to adopt the only alternative which men of honour thought open to him . . . he to the last relied upon an amicable adjustment and went out determined not to fire at deceased and did so at last in a state of nervousness." It is no great wonder that the jury took the very broad hint and followed the example of other juries who, finding "all was fair," refused to convict. The Chief Justice notes that "the jury was but a short time in consultation."[21]

Wilson subsequently married the young lady, who was amiable and accomplished; not the faintest suspicion was

[20] This reminds one of the charge of Chief Justice Fletcher of the Court of Common Pleas of Ireland, when in the second decade of the 19th century, he presided over the trial of one Fenton for the murder of Major Hillas, whom he had killed in a duel: "Gentlemen, it is my business to lay down the law to you, and I will. The law says the killing a man in a duel is murder, and I am bound to tell you it is murder; therefore in the discharge of my duty, I tell you so; but I tell you at the same time, a fairer duel than this, I never heard of in the whole *coorse* of my life."

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ever breathed against her except the jesting remark of young Lyon made to tease his comrade and not expected or intended to be taken seriously.

Wilson was called to the Bar in 1835 and was at once sent by Boulton to conduct a branch office in Niagara; but in a very short time he removed to London where he obtained a very large practice. After serving in the Rebellion as Captain of Militia he became a Member of the House of Assembly and afterwards in 1863 was elected to the Legislative Council. He did not take his seat in the Council as he was in that year appointed to the Bench of the Court of Common Pleas as a Puisne Justice. He survived until 1869, never it is said ceasing to deplore the unhappy fate of his boyhood's friend Lyon,[30] or his own part in it.

[30] Lyon was of the prominent and well-known family of that name in Eastern Ontario. George Bryon Lyon Fellowes (a nephew) and the Judge Lyon of Ottawa, were relatives.

Robert Lyon was a cousin of the wife of his master, Mr. Thomas Maybee Radenhurst (called and admitted April 21st, 1824), and lies buried in the Radenhurst plot in the old Anglican burying ground, at Perth, Ontario. A headstone placed there by his friends commemorates his fall "in mortal combat."

WILLIAM RENWICK RIDDELL.

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DAMAGES RECOVERABLE IN CONTRACT.

An action of *Catherine O'Rourke* v. *Cunard Steamship Company* has been recently proceeding through the Courts of New York State, on its way to the Court of Appeals, which has some interesting features, and will best serve to introduce the subject of this Article. The plaintiff was an Irish immigrant who took her passage as a third class passenger to New York from Queenstown on the SS. Campania in April, 1911. The contract embodied in her ticket contained a provision that—'All questions arising on this ticket shall be decided according to English law, with reference to which this contract is made.' On the passage over, as the plaintiff alleged, the ship's doctor, under the pretence of examining her in order to ascertain in compliance with the supposed requirements of the British Merchants Shipping Act, whether she was the mother of a child born during the voyage (which she was afterwards shewn not to have been), subjected her to repeated assaults of the vilest and most indecent character, and of the utmost cruelty. She, therefore, brought this action against the Cunard Company claiming damages for breach of its contract of safe carriage in respect, amongst other things, to the physical suffering she had endured, and also in respect to 'the mental anguish, nervous shock, indignity, humiliation, degradation, and other damage and disparagement to her personal feelings.'

Under certain interlocutory proceedings which took place before the trial, and into the details of which it is not necessary to enter here, all claim as for tort was excluded, and the plaintiff's claim was strictly confined to damages recoverable under English law for breach of the contract for safe carriage. At the trial, an English barrister, called to give evidence as to the law of England, without going into any question of remoteness, adduced the decision of the House of Lords in *Addis* v. *Gramophone Company*,[1] and testified, simply, and mainly on the authority of that case, that, under the law of England, damages could not be recovered in an action, purely on contract, for injured feelings, save only in the case of breach of promise of marriage.[2] The trial judge, however, declined so to charge the jury, but, on the contrary, directed

[1] [1909] A. C. 488.

[2] There was little or no evidence given of actual physical injury sustained by the plaintiff.

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them that the plaintiff, if they believed her story, would be entitled to recover a verdict for such an amount "as would compensate her for her pain and suffering, and for the humiliation and injury to her feelings and injury to her health." The result was that the jury found a verdict for the plaintiff for $35,000.

The defendants, thereupon, appealed to the Appellate Division of the Supreme Court, which directed a new trial unless the plaintiff agreed to have the amount of the verdict reduced to $17,500 which, we understand, she has done. The Court, with the exception of one judge, gave no written Reasons, but the official memorandum deciding the case states—

> 'The Court is of opinion that the question of damages submitted to the jury is in accordance with the English law. That such damages are recoverable as naturally flow from the contract, or are contemplated by the parties to the contract.'

It thus appears that the Court treated the matter as purely a question of remoteness of damages, and held that the damages recovered were not too remote within the well-known rule in *Hadley* v. *Baxendale*.[3] So, too, the learned judge who did give written Reasons, treated the question as one of remoteness of damages, but differed from the rest of the Court in that he held that the damages recovered for were too remote. The defendants, we understand, have now appealed to the Court of Appeals.

My submission in this Article is that, quite apart from any question of remoteness of damages, damages cannot be recovered in English law, or our law, in a mere action of contract, for injured feelings whether mental or physical, and that for quite a different reason than remoteness.[4] The reason why a certain obscurity may exist in the matter is that in so many of the cases against carriers of passengers tort is combined with contract.

There is, indeed, an old English case which decided the other way, namely, *Coppin* v. *Braithwaite*;[5] and this is the one and only English case which the American text-writer Mr. Sedgwick, in his well-known book on Damages[6] cites

[3] 9 Ex. 341, at p. 345.

[4] It would seem that under Quebec law, damages are recoverable against a railway company for insulting language used towards a passenger by one of its conductors: *Tudor* v. *Quebec and Lake St. John R. W. Co.* (1911), Que. 41 S. C. 19.

[5] (1844) 8 Jur. Pt. 2, p. 875.

[6] 9th ed. 1912, § 865.

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in support of the proposition that 'the plaintiff may recover compensation for the indignity of being ejected from the train.' In *Coppin* v. *Braithwaite* the plaintiff declared in *Assumpsit* on an agreement to carry him in a ship to a particular place, and alleged that the defendants, by their agent the captain of the ship, caused him to be disembarked at an intermediate point, and caused the disembarkation to be conducted in a scandalous, disgraceful, and improper manner, whereby, and also by contemptuous usage and insulting language addressed to him by the captain in effecting such disembarkation, he sustained damage. A Court containing no lesser names in the law, than Barons Parke, Alderson, and Rolfe, held that the trial judge acted rightly in receiving evidence of the language of the captain of the defendants' ship when putting the plaintiff on shore, in which he described him as a pickpocket, and belonging to the swell mob: and, also, in directing the jury that the defendants were responsible for *any* injury naturally resulting from the acts of the captain.

Parke, B., said (p. 677):—

> "The turning the plaintiff out was part of the breach, the mode of turning him out is part of the evidence in the case. A contract is broken, and it is quite impossible to exclude from the view of the jury, the circumstances under which it is broken. Surely it would make a most material difference if the contract were broken because it would be inconvenient to carry him to his journey's end, and if he were turned out under circumstances of aggravation."

But although Mr. Sedgwick in his last edition has, as already stated, treated *Coppin* v. *Braithwaite* as still authoritative, I find Mr. Arnold in his work on Damages (1913) does not refer to it at all; nor is it referred to in the volume of Halsbury's Laws of England dealing with Damages; while it is dropped altogether out of the series known as the Revised Reports.[7] This might of itself be sufficient to indicate that in the legal opinion of England it was no longer an authority; but the recent case of *Addis* v. *Gramophone Co.*,[8] in the House of Lords places the matter, I submit, beyond a peradventure. The actual point decided by their lordships, in regard to the matter now under discussion, is that where

[7] See Vol. 131 which deals with 8 Jur. N. S.
[8] [1909] A. C. 488.

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a servant is wrongfully dismissed from his employment, the damages for the dismissal cannot include compensation for his injured feelings;[9] but their judgments abundantly shew that the same thing applies to damages recoverable upon breach of contract generally, with the exception of one or two special kinds of contract. Thus Lord Atkinson says (p. 495):—

> "There are three well-known exceptions to the general rule applicable to the measure of damages for breach of contract, namely, actions against a banker for refusing to pay a customer's cheque when he has in his hands funds of the customer's to meet it, actions for breach of promise of marriage, and actions like that in *Flureau* v. *Thornhill*,[10] where the vendor of real estate, without any fault on his part fails to make title. I know of none other. . . . If there be a tendency to create a fourth exception it ought, in my view to be checked rather than stimulated; inasmuch as to apply in their entirety the principles on which damages are measured in tort to cases of damages for breaches of contract would lead to confusion and uncertainty in commercial affairs, while to apply them only in part and in particular cases would create anomalies, lead occasionally to injustice, and make the law a still more 'lawless science' than it is said to be."

Again Lord James of Hereford says (p. 492):—

> "My lords, I may say if I had arrived at a different conclusion I should have been subjected to some feeling of remorse, because during many years when I was a junior at the Bar, when I was drawing pleadings, I often strove to convert a breach of contract into a tort in order to recover a higher scale of damages, it having been then as it is now, I believe, the general impression of the profession that such damages cannot be recovered in an action of contract as distinguished from tort, and therefore it was useless to attempt to recover them in such a case. That view, which I was taught early to understand was the law in olden days, remains true to this day."

Lord Loreburn, L.C., says (p. 490):—

> "To my mind it signifies nothing in the present case whether the claim is to be treated as for wrongful dismissal or not. In any case there was a breach of con-

[9] It seems sufficiently obvious that when breach of contract is accompanied by *physical* pain to the defendant there must be a tort, as well as a breach of contract, as *e.g.*, assault, or injury caused by negligence.

[10] (1776) 2 W. Bl. 1078.

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tract in not allowing the plaintiff to discharge his duties as manager, and the damages are exactly the same in either view." [11]

It is quite true that the rule is different in the law of New York State, and the direction of the learned judge in *O'Rourke* v. *Cunard S.S. Co.* would apparently have been quite correct if he had had to apply the law of that State instead of English law; and we have here an excellent example of a divergence between our English case law, and that of the United States. *Gillespie* v. *Brooklyn Heights* [12] is very much in point. There a passenger tendered a conductor 25c, the proper fare being 5c, and asked for a transfer, and after the conductor had attended to another passenger, she demanded the change, whereupon the conductor denied having received any amount in excess of her fare, and in an abusive and impudent manner not only refused to return the change, but grossly insulted her by calling her a deadbeat and a swindler, and by the use of other insulting and improper language, even after a fellow passenger had informed him that she had given him the amount claimed. The trial judge directed a verdict for the plaintiff of 20c; but the Court of Appeals reversed this, holding the railroad company liable to a passenger in compensatory damages for the humiliation and injury to her feelings.

But my submission is that the reason why English law does not allow damages for injured feelings in an action on contract is not because they are too remote, for, in truth, they may be the most natural consequences of the particular breach. It can scarcely, for example, be otherwise than insulting and injurious to the feelings of a respectable passenger to be ordered off a car; or for a female passenger to be required to submit to a physical examination by a ship's doctor, even though there be no violence or assault in the case. The reason damages for injured feelings are not recoverable in English law for breach of contract is, I submit, because no damages are recoverable in contract for what is not measurable in money. One feels by instinct that this must be so, and that insult, humiliation, injured feelings,

[11] No notice whatever is taken of *Coppin* v. *Braithwaite*, *supra*, p. 741.

[12] (1904) 178 N. Y. 347. See, also, *Busch* v. *Interborough R. T. Co.*, 187 N. Y. 388; *De Wolf* v. *Ford*, 193 N. Y. 397; *Aaron* v. *Ward*, 203 N. Y. 351.

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are things quite outside the sphere of contract. Contracts are business arrangements between the parties thereto that some act or acts shall be done or forborne; and it appeals to the juridical reason within one that the damages recoverable on breach should be the pecuniary loss resulting from the non-fulfilment of the contract, and that anything else should be left to the tender mercies of the law of tort. For as Lord Atkinson says in *Addis* v. *Gramophone Co.*[13]:—

> "In many cases of breach of contract there may be circumstances of malice, fraud, defamation, or violence, which would sustain an action of tort as an alternative remedy to an action for breach of contract. If one should select the former mode of redress, he may, no doubt, recover exemplary damages, or what is sometimes styled vindictive damages; but if he should choose to seek redress in the form of an action for breach of contract, he lets in all the consequences of that form of action. One of these consequences is, I think this: that he is to be paid *adequate compensation in money for the loss of that which he would have received had his contract been kept, and no more.*"

But the matter is not left without even more clear authority for the proposition which I have advanced. In *Hamlin* v. *Great Northern R. W. Co.*[14] Pollock, C.B., delivering the judgment of the Court, says:—

> "The action is brought to recover damages for a breach of contract. A contract to marry has always been considered an exceptional case, in which the injury to the feelings of the party may be taken into consideration. So in the case of wrongs not founded on contract, the damages are entirely a question for the jury who may consider the injury to the feelings, and many other matters which have no place in questions of contract. *In actions for breach of contract the damages must be such as are capable of being appreciated or estimated.*"

The well-known case of *Hobbs* v. *The London and South Western R. W. Co.*,[15] in which *Hamlin* v. *Great Northern R. W. Co. supra,* was much referred to, does not impugn its authority at all, but merely explains that it is not to be understood as meaning that if one has taken a ticket to a

[13] [1909] A. C. 488, 496.
[14] (1856) 1 H. & N. 408, at p. 411.
[15] (1875) L. R. 10 Q. B. 111.

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certain place, and by reason of being taken along the wrong branch of the railway to a different place, is forced to walk several miles in order to get to one's destination, a jury cannot award damages for the personal inconvenience thus resulting from the breach of the contract of carriage. Thus Mellor, J., says (pp. 122-3):—

"I quite agree with my Brother Parry, that for the mere inconvenience, such as annoyance and loss of temper, or vexation, or for being disappointed in a particular thing which you have set your mind upon, without real physical inconvenience resulting, you cannot recover damages. That is purely sentimental, and not a case where the word inconvenience, as I here use it, would apply. But I must say, if it is a fact that you arrived at a place where you did not intend to go, where you are placed, by reason of the breach of contract of the carriers, at a considerable distance from your destination, the case may be otherwise. It is admitted that if there be a carriage you may hire it and ride home and charge the expense to the defendants. The reason why you may hire a carriage and charge the expense to the company is with the view simply of mitigating the inconvenience to which you would otherwise be subject; so that where the inconvenience is real and substantial arising from being obliged to walk home, I cannot see why that should not be capable of being assessed as damages in respect of inconvenience."

So Archibald, J., says (p. 124):—

"I think there is no difficulty in applying to the inconvenience which has been suffered a pecuniary measure of damages. The case is not one of mere vexation, but it is one of physical inconvenience, *which can in a sense be measured by money value,* and the parties here had the fair measure of that inconvenience in the damages given by the jury."

And Blackburn, J., says (p. 120):—

"What the passenger is entitled to recover *is the difference between what he aught to have had and what he did have;* and when he is not able to get a conveyance at all, but has to make the journey on foot, I do not see how you can have a better rule than that which the learned judge gave to the jury here, namely, that the jury were to see what was the inconvenience to the plaintiffs in hav-

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ing to walk, as they could not get a carriage. Taking that view they were certainly entitled to recover for that."

Lastly, Cockburn, C.J., says (p. 117):—

"As far as the case of *Hamlin* v. *Great Northern R. W. Co.* goes, I am far from saying it was a wrong decision; but it did not decide that personal inconvenience, however serious, was not to be taken into account as a subject-matter of damage in a breach of contract of a carrier to convey a person to a particular destination."

I, therefore, must, with all respect to the Courts of New York State, submit that if Catherine O'Rourke's claim against the Cunard Steamship Company is to be determined by English law, inasmuch as she is restricted altogether to her claim as for breach of contract, (see *supra* p. 739) she can recover nothing for humiliation, insult, or injured feelings resulting from the ship doctor's treatment of her.

A. H. F. L.

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LOCALITY OF A CHOSE IN ACTION.

The expression 'chose in action' has generally reference to any right recoverable by action in contrast with anything not only actually owned but physically possessed by a person. "Property in chattels personal," says Blackstone, "may be either in possession, which is when a man hath not only the right to enjoy but hath the actual enjoyment of the thing; or else it is in action, where a man hath only a bare right without any occupation or enjoyment:" (2 Com. 396). From *Termes de la Ley* a definition is taken, reading as follows:—

"'Things in Action,' is where a man hath cause, or may bring an action for some duty due to him as upon an obligation for breach of covenant, for trespass or the like; and, indeed, wherever a thing is not in possession, but when for recovery of it, a man is driven to his action (and consequently enjoys a right merely) such thing is called a 'chose in action.'"

In the *Canada Law Journal*, vol. 21 (1885) an Article takes exception to several definitions, among them the foregoing, on the ground briefly that they make the expression predicate the idea of its being a thing whereas it can at most convey only an abstract idea of a thing or property.

In the Article referred to it is said:—

"'A chose in action' is any personal right or demand which may be enforced or recovered by an action in *personam;* it includes not only the right of action, but also the right or demand to be enforced or recovered; at the same time the right or demand when enforced or recovered *ipso facto* ceases to be a 'chose in action.'"

A passage from an Article in the *Law Quarterly Review*, Vol. 11, pp. 228, 229, by T. Cyprian Williams, may be quoted as giving a clear insight into the nature of a chose in action and accords, by the way, with the Canada Law Journal Article referred to. It reads:—

'If we examine the nature of things in action, we shall soon see that they are merely claims enforceable at law, and that man entitled to a thing in action has *no thing* (in the primary sense), and has not even anything which he can take. For example, in the case of a chose in action proper, as a debt, what is the thing, which is or lies in action, and which the person entitled thereto is said to have? It cannot

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be anything tangible, for the contracting of a debt (otherwise than by judgment and except to the Crown) gives the creditor no interest whatever in, or charge upon, any money or other property of the debtor. If the debtor refuse payment, the creditor cannot take the amount due to him out of the debtor's money without committing theft; he has no legal remedy but to sue the debtor. When a debt is paid, the creditor ceases to have a chose in action; but the true effect of payment is not that the thing, which he had before in action, is handed over to him and so becomes a thing in possession. It is that the debtor's obligation is discharged and extinguished, and the former creditor (if paid in cash) acquires the ownership of certain coins, in which he previously had no interest at all. The thing therefore which lies in or is to be exacted by action, and which the creditor has, appears to be no tangible object, but to be the debtor's duty to pay the amount owing."

The distinction between a 'legal chose in action' and an 'equitable chose in action' is that the first is so called when recoverable formerly in a Court of law, and the latter is so termed when recoverable only in a Court of equity.

The law as to the *quasi locality* ascribed to a chose in action, for according to the authorities it has no locality in the exact sense, is sometimes involved and elusive and has received less specific treatment in the text books and the Courts than has other questions bearing on the subject of a chose in action. But although the doctrine that a chose in action has no locality is now thoroughly established by the English law, *vide Lee* v. *Abdy*[1]; *Inland Revenue Commissioners of Stamps* v. *Hope*[2]; *Velazquez, Ltd.* v. *Inland Revenue Commissioners*[3]; *Rex* v. *Lovitt*,[4] questions often arise as to claims arising from a chose in action which cannot be solved without regard to locality. While there is generally little or no difficulty in determining the situation of property for the purpose of enforcing rights, there is sometimes considerable difficulty in ascertaining that in the case of debts and other choses in action. As stated by Professor Dicey, (2nd ed., pp. 309, 310), property consisting of tangible things must in general be held to be situate at the place where at a given

[1] 17 Q. B. D. 309.
[2] [1891] A. C. 476-481.
[3] [1914] 2 K. B. 404, affirmed 30 Ti. L. R. 539.
[4] [1912] A. C. 212.

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moment it actually lies. In some instances, however, as in the case of choses in action, property is to be considered as situate at the place where it can be effectively dealt with, i.e., where the debtor or other person against whom a claim exists resides, being the place where they are properly recoverable or can be enforced. A specialty debt, however, is given the locality where the specialty itself is locally situate. *Inland Revenue Commissioners of Stamps* v. *Hope, supra.* This case was an appeal from the Supreme Court of New South Wales on a special case stated for the opinion of the Court and involved the legality of a duty imposed upon money of a deceased. It was held that the locality of a specialty debt so far as such locality could be ascribed to it was the place where the contract was situate. Lord Field in delivering judgment said at pp. 481, 482:—

> "It has long been established in the Courts of this country and is a well-settled rule governing all questions as to which Courts can confer the required authority, that a debt does possess an attribute of locality, arising from and according to its nature, and the distinction drawn and well-settled has been and is whether it is a debt by contract or a debt by specialty. In the former case the debt being merely a chose in action—money to be recovered from the debtor and nothing more—could have no other local existence than the personal residence of the debtor, where the assets to satisfy it would presumably be. . . . But inasmuch as a debt under seal or specialty, had a species of corporeal existence by which its locality might be reduced to a certainty, and was a debt of a higher nature than one by contract, it was settled in very early days that such a debt was *bona notabilia* where it was "conspicuous," i.e., within the jurisdiction within which the specialty was found at the time of death."

He also, at p. 483, on this subject, refers to 2 Fisher on Mortgages, 3rd ed., secs. 1328, 1334, in support of the doctrine that debts secured by promissory notes and arising from a mortgage merge into the mortgage, and can, therefore, be recoverable only in the place where the holder resides, being the place where the debt or interest on such mortgage is locally situate as their *situs* depends upon that of the mortgage. That *situs* is presumably in the place in which the mortgagee lives. Where the word "contract" occurs the second time in the extract from Lord Field's judgment it is

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plain from the context that he meant by it a simple contract not a specialty contract.

In the case of *Rex* v. *Lovitt*,[5] Lord Robson who delivered judgment recognized the principle above stated that simple contract debts have no local situation, the question of the locality of such debts being raised in that case which distinguished between the *lex loci* for administration and the *lex domicilii* for distribution. In that case it was contended by the defendants that the situation of the moneys deposited in a New Brunswick Bank by a testator who died in Nova Scotia was to be determined, not by its actual locality, but according to the principle expressed in the maxim *Mobilia sequuntur personam*, arguing in other words that personal property of a movable nature is to be considered as following the person of the owner, and is legally situate where he is domiciled, according to which view the property would be situate in Nova Scotia. The New Brunswick legislature had passed the New Brunswick Succession Duty Act, 1896, and the main question raised in the case was whether the moneys of the testator so deposited were subject to succession duty under that Act. Their lordships decided that under the Act the moneys or debts were property situate within the province of New Brunswick. Under that Act all property situate within the province is liable to succession duty whether the deceased was domiciled there or not, the collection of such duty according to the Act being by its provisions made similar to a probate duty payable for local administration, and the property, consisting of simple contract debts, was for the purpose of legal representation, of collection and of administration, governed by the law of New Brunswick where it was locally situate. "For the purpose of succession and enjoyment the law of the domicile governs the foreign personal assets. For the purpose of legal representation, of collection, and of administration, as distinguished from distribution among the successors, they are governed not by the law of the owner's domicile but by the law of their own locality:" *Blackwood* v. *Reginam*[6]; *Rex* v. *Lovitt, supra*, at p. 221.

"When, therefore, it is said that *Mobilia sequuntur personam* all that is meant is that for certain limited purposes we deal with '*mobilia*' (or leave them to be dealt with) under the law governing their owner as though they were

[5] [1912] A. C. 212.
[6] 8 App. Cas. 93.

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situate in his country instead of ours, and, in return, foreign countries generally do the like with regard to English movables situate abroad:" *Rex* v. *Lovitt, supra,* at p. 221.

As, however, the New Brunswick Succession Duty Act, a revenue Act *intra vires* under sec. 92 of the British North America Act, in effect excluded for the purposes of the duty the application of the maxim *mobilia sequuntur personam* as regards personal estate within the province belonging to persons domiciled elsewhere, by making all personal property situate within the province liable to succession duty whether deceased was domiciled there or not, their lordships held, reversing the judgment of the Supreme Court of Canada, that the executors of the deceased were liable to pay succession duty.

It was observed by their lordships, at p. 220, that movables do not entirely follow the owner and that the actual situation of the property of a deceased owner cannot be ignored "for executors find themselves obliged, in order to get the property at all, to take out ancillary probate according to the locality where such property is properly recoverable, and no legal fiction as to its following the owner so as to be theoretically situate elsewhere will avail them. The case of legacy and succession duties, however, has been placed by our law on a different footing."

In probate cases the question as to the proper *forum* for the recovery of choses in action is therefore comparatively involved as they furnish an exception to the principle followed in deciding the place where debts and other choses in action are generally recoverable. It may also be here remarked that shares are locally situate in the place where the head office of the Company is: *Atty.-General* v. *New York Breweries Co.*[7] English trade marks are situate in England: *Le Couturier* v. *Reginam.*[8]

As regards the locality of book debts locally situate in Argentina, South America, and forming part of a claim for assets sued for in England, the case of *Velazquez Limited* v. *Inland Revenue Commissioners,*[9] decided that they were not property 'locally situate out of the United Kingdom' within the meaning of the exception in sec. 59, sub-sec. 1 of the Stamp Act 1891. Scrutton, J., considered himself

[7] [1899] A. C. 283.
[8] [1910] A. C. 262.
[9] [1914] 2 K. B. 404.

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bound in so holding by the present state of the authorities. His decision was confirmed on appeal 30 Ti. L. R. 539.

Although the practitioner is primarily guided by the locality of the debtor in deciding the proper *forum* ordinarily for recovering a debt, he is also obliged to consider whether the contract out of which it arises is a valid contract, or whether there is some defence grounded upon the law of the place where the contract was entered into. A chose in action may for that reason be said to have a quasi dual locality. The case of *Lee* v. *Abdy*,[10] may afford an apt illustration. A contract of insurance was effected by one Lawrence Lee, residing in Kimberley, South Africa, with a life insurance company in London. In Cape Colony he assigned his property to his wife the plaintiff who survived him, he having remained afterwards in Cape Colony till his death. The plaintiff assignee sued in England the trustees of the insurance company. By the law of the Colony the assignment was void as it was made by the assignor to his wife, and it was held accordingly void and irrevocable in England as the contract of assignment was governed by the law of Cape Colony, notwithstanding that the subject matter of the assignment was a chose in action having no locality.

Conflict of laws also arise in connection with some claims in actions *ex delicto*. In *Story* v. *Stratford Building Company*,[11] it was decided in the Supreme Court of Ontario that to give the Courts of Ontario jurisdiction to entertain an action for a tort committed abroad, the act must be actionable in Ontario, and not excusable or justifiable in the law district where it was committed. In the case of *Simonson* v. *Canadian Northern R. W. Co.* (tried in Manitoba King's *Bench*,[12] it was also held that in order to recover for a tort committed in another province, it must be one that is actionable under the *lex fori*.

It seems to be admitted that inasmuch as adult persons are apt to have a fixed residence or place of business that is the proper place of the *forum actionis* in simple actions for the recovery of choses in action. There the debtor and his property can be most conveniently reached. It might appear desirable and more consistent, therefore, to say that a chose in action has practically a locality the same as that

[10] 17 Q. B. D. 309.
[11] 11 D. L. R., at p. 49.
[12] 15 D. L. R. 24.

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of the debtor. To modify the law to that extent, however, would not remove difficulties which occur in connection with the recovery of choses in action generally. It is true that in most cases a locality, or quasi locality, is attributed to a chose in action by reason of the locality of a person, the debtor or defendant. But this is done not because of itself but because of a reason outside of itself, and its locality must always continue to be a dependent one, in contrast with tangible property.

It may seem that there is an inconsistency between the decisions given in *Velazquez* v. *Inland Revenue Commissioners*,[13] in which the application of the words of sec. 59 of the Stamps Act, 1891, 'property locally situate out of the Kingdom' came into question, and other English decisions in which the same section was construed. In the two cases of the *Smelting Company of Australia* v. *Inland Revenue Commissioners*[14] and *Urban* v. *Inland Revenue Commissioners*,[15] it was held that foreign patent rights although regarded as property are not within the exception made by that section, and in *Inland Revenue Commissioners* v. *Muller's Margarine Co.*,[16] it was decided that the good will of a business is within it. Scrutton, J., in the Velazquez case made a distinction between that case and the Muller case to the effect that a mere personal right to a debt not attached in any way to land has no local situation, as was reasoned in a precedent which he felt himself bound to follow, viz.: the *Danubian Sugar Factories* v. *Inland Revenue Commissioners*,[17] which decided that an agreement to sell or let undetermined land in Rumania and to cultivate and supply beet-root for the purpose of a sugar factory to be built on the land gave a mere personal incorporeal right, such as a chose in action, not so attached to land as to come within the Muller case. On the same principle the Muller case may be distinguished from the other two Inland Revenue Commissioners cases. It is obvious that greater clarity is required in the law as to such cases, and that any authoritative tribunal that will meet this need by turning such further light on them as will more effectively

[13] [1914] 2 K. B. 404.
[14] [1897] 1 Q. B. 175 (C.A.).
[15] [1913] 29 Ti. L. R. 141, 476.
[16] [1901] A. C. 217.
[17] [1901] K. B. 245 (C. A.).

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remove apparent inconsistencies, will earn well of both the lawyers and the public.

American decisions display, a want of unanimity as regards the *situs* of shares. In the case of *In re Miller's* Estate,[18] it was decided by the Supreme Court of Kansas on appeal that the *situs* of shares of capital stock in a Kansas corporation owned by one who was a resident of another State at the time of his death, for the purpose of administration, is at the domicile of the decedent, rather than in the State in which the corporation is organized and has its place of business. It was acknowledged by the Court that under the common law and as a general rule the *situs* of personal property is the residence of the owner and the title to personalty is in the domiciliary executor or administrator, although this rule may be modified by statute, and frequently it is so modified for taxation and some other purposes. A statute (Gen. Stat., sec. 1734) of the State provides 'that the stock of any corporation created under the Act shall be deemed personal estate,' and it was therefore reasoned that the corporate stock in question necessarily falls within the same classification as personal property unless the statute gave it a *situs* elsewhere for purposes of administration. And *Griffith* v. *Watson*,[19] was cited as deciding that capital stock of a corporation should be taxed at the residence of the owner, and not in the city where the corporation was located and engaged in business. The ruling in this case was made upon the theory that stock was personal property and came within the common law rule that the domicile of the owner draws to it all his personal estate, and the statute had likewise so provided. *Covington* v. *Covington First Nat. Bank*,[20] was also referred to as deciding that the *situs* of shares of foreign held stock in an incorporated company, in the absence of legislation imposing a duty upon the company to retain the stock within the State as the agent of the owner, is at the domicile of the owner."

In *Bradley* v. *Bauder*,[21] *State* v. *Branin*,[22] and *Newark City Bank and Newark Fourth Ward Assessor*,[23] It was

[18] 90 Kan. 619.
[19] 19 Kan. 23.
[20] 198 U. S. 100.
[21] 38 Am. Rep. 547.
[22] 23 N. J. L. 484.
[23] 30 N. J. L. 13.

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held that shares of stock had a *situs* for the purposes of taxation in a State other than that in which it was located and where its capital was invested in real property. Cook on Corporations, 7th ed., sec. 366, was also quoted to the effect that the *situs* follows the domicile of the owner.

Johnston, C.J., dissented from the decision of the Court and argued that it is generally recognized that certificates of stock are not debts, credits, securities or chattels, but are simply evidences that the holder is a member of and has an interest in a corporation which itself owns all of its property. He cited Thompson on Corporations, 2nd ed., vol. 4, sec. 3471, as saying that 'the general rule is that shares of stock in a corporation are personal property whose location is in the State where the corporation is created. It is true that for purposes of taxation and some other similar purposes, stock follows the domicile of its owner, but considered as property separated from its owner, stock is in existence only in the State of the corporation.' On this point the Supreme Court of the United States has said:—"The certificates are only evidence of the ownership of the shares, and the interest represented by the shares is held by the company for the benefit of the true owner. As the habitation or domicile of the company is and must be in the State that created it, the property represented by the certificates of stock may be deemed to be held by the company within the State whose creature it is, whenever it is sought by suit to determine who is its real owner." *Grayson* v. *Robertson*,[24] *Richardson* v. *Busch*,[25] *Matter* v. *Arnold*,[26] *State* v. *Davis*,[27] and other authorities were cited by him to the same effect, while he explained Cook on Corporations as meaning that for taxation and a few other purposes the *situs* follow the domicile of the stockholder, but for purposes concerning the title to the stock, for attachment and execution and for other similar purposes the *situs* is that of the corporation.

[24] 122 Ala. 330.
[25] 198 Mo. 174.
[26] 99 N. Y. 740.
[27] 88 Kan. 849.

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DOMINION STATUTES FOR 1914 (2ND SESSION) AND 1915.

As may be expected in times like these, the volume containing the Dominion statutes for 1915 is mainly made of Imperial and Dominion Orders in Council, to which are added some of the Imperial statutes called for and enacted under the present emergency, and certain Dominion statutes passed in the second session of last year. Of the latter Ch. I. grants out of the Consolidated Revenue Fund a sum not to exceed $50,000,000 towards defraying any expenses which may be incurred by the Governor in Council during the year ending March 31st, 1915, for the defence and security of Canada, the conduct of naval and military operations in and beyond Canada, promoting the continuance of trade, industry and business communications whether by means of insurance or indemnity against war risk or otherwise, and the carrying out of any measures deemed necessary or advisable by the Governor in Council in consequence of the existence of a state of war.

Ch. II. gives the Governor in Council like power to make orders and regulations respecting censorship and the control and suppression of publications, writings, maps, plans, photographs, communications and means of communication; arrest, detention, exclusion and deportation; control of the harbours, ports, and territorial waters of Canada and the movements of vessels; transportation by land, air, or water, and the control of the transport of persons and things; trading, exportation, importation, protection and manufacture; appropriation, control, forfeiture and disposition of property and the use thereof.

Ch. III., entitled an Act to conserve the Commercial and Financial Interests of Canada, empowers the Governor in Council in like manner to—

(a) Authorise the making of advances to the chartered banks and to the savings banks to which The Quebec Savings Bank Act, 1913, applies, by the issue of Dominion notes upon the pledge of securities, deposited with the Minister, of such kind and amount as may be approved by the Treasury Board; such advances to be repayable at such times as the Board may determine, with interest at a rate likewise determined by the Board of not less than five per cent. per annum;

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(b) Authorise the chartered banks to make payments in the bank notes issued by such banks instead of in gold or Dominion notes, but the total amount of the notes of any chartered bank in circulation at any time shall not exceed the amount of its notes issuable under the provisions of the *Bank Act* and of clause (c);

(c) Authorise the several chartered banks to issue excess circulation, from and including the first day of March in any year, to and including the last day of August next ensuing, or during any part of such period, to amounts not exceeding fifteen per cent. of the combined unimpaired capital and rest or reserve fund of the respective banks, as stated in their respective statutory monthly returns to the Minister for the month immediately preceding that in which the additional amount is issued;

(d) Suspend the redemption in gold of Dominion notes; and

(e) Authorise, in so far as the same may be within the legislative authority of the Parliament of Canada, the postponement of the payment of all or any debts, liabilities and obligations, however arising, to such extent, for such time and upon and subject to such terms, conditions, limitations and provisions as may be specified in the proclamation.

Ch. IV. provides that for every issue of Dominion notes up to fifty million dollars the Minister of Finance must hold as security not less than twenty-five per centum in gold, while as security for the redemption of Dominion notes issued in excess of fifty million dollars, he is required to hold an amount in gold equal to such excess. This substitutes 'fifty million dollars' for the 'thirty million dollars' of R. S. O. 1906, ch. 27.

Of the Dominion statutes for 1915, Ch. I. makes a very important addition to sec. 88 of the Bank Act, by enabling banks to lend money to the owner, tenant, or occupier of land for the purchase of seed grain upon the security of any crop to be grown from such seed grain.

Ch. VIII. is *The Special War Revenue Act, 1915.* It requires (1) every bank to pay quarterly to the Minister of Finance for the Consolidated Revenue Fund a tax equal to one-fourth of one per cent. upon the average amount of the notes of the bank in circulation during the three months ending December 31st, March 31st, June 30th, and September 30th preceding;

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(2) Every Trust and Loan Company to pay in like manner a tax of one per cent. upon the gross amount of—(a) interest, the property of the company, from loans and investments in Canada, and (b) income, other than interest, on business transacted within Canada,—received by the company on and after January 1st, 1915;

(3) Every insurance company, other than life, marine, a paternal benefit society, or a purely mutual company, duly licensed, to pay in like manner a tax of one per cent. upon the net premiums received by it in Canada on and after January 1st, 1915;

(4) Every cable company and telegraph company to pay in like manner a tax equal to one per cent. on each despatch or message, other than press despatches or messages;

(5) Every purchaser of railway or vessel tickets to pay a tax, in respect of a ticket costing—(a) over $1 and not more than $5, five cents; (b) for each $5 or fractional part of $5, over $5, five cents, with other like taxes on sleeping and parlour car tickets.

Then follow the provisions for stamp duties on cheques and other negotiable instruments, money orders, letters, and post cards with which we are all only too familiar; and also for stamp duties on articles in bottles and packages.

Chapters IX. and X. amend the Adulteration Act, and Canada Grain Act respectively. Ch. XI. is an Act to enable Canadian soldiers on active military service during the present war to exercise their electoral franchise.

Ch. XII. amends the Criminal Code by inserting new provisions making assisting alien enemies to leave Canada for the purpose of rendering assistance to the enemy, and frauds in connection with the sale of military stores, indictable offences punishable with two years' imprisonment, and in the case of the latter, also to a fine of $5,000. Then follow entirely new provisions making infringement of Canadian copyright in dramatic or operatic works or musical compositions punishable by fine and imprisonment; as, also, making an unauthorised change in or suppression of the title, or the name of the author of any such work or an unauthorized change in the work or composition itself.

There is also a provision, which also appears to be quite new, making anyone who is an *inmate* of a common bawdy house guilty of an indictable offence, and liable to a fine of $100, or imprisonment up to twelve months.

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There are also chapters amending the Dominion Controverted Elections Act, the Dominion Elections Act, the Gold and Silver Marking Act, 1913, the Government Railways Act, the Inland Revenue Act, the National Transcontinental Railway Act, the Representation Act, 1914, the Winding-up Act and the Yukon Placer Mining Act (by preserving the rights of holders of mining claims on active service.)

The last two chapters are Ch. XXIII. appropriating $100,000,000 to meet the exigencies of the present war as in the case of the War Appropriation Act 1914, noted *supra* p. 756, and Ch. XXIV., being the annual Appropriation Act.

There is also a statute not already noticed (Ch. 20), empowering the Governor in Council to provide for the purchase, sale and distribution during the present year, among such farmers and settlers in Alberta and Saskatchewan as apply for the same, of seed grain, fodder for animals, and other goods by way of relief, in such quantities and upon such terms as to the taking of security for the repayment of the cost of the same as shall appear necessary or proper.

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CURRENT COMMENTARY UPON RECENT ENGLISH AND CANADIAN DECISIONS.

ENGLISH CASES.[1]

Implied Right to Commit Nuisance.—In *Pwllbach Colliery Company* v. *Woodman.*[2] The colliery company had, under their lease, the 'power . . . to carry on . . . the trade . . . of miners' on the demised premises. The plaintiff, a butcher, held adjoining land, under a later lease from the same landlord, 'subject to all rights and easements belonging to any adjoining or neighbouring property. The colliery company erected on the land demised to them a screening apparatus and plant. The plaintiff brought this action for an injunction complaining that the colliery company by their screening operations caused a nuisance to his slaughter-house and sausage-factory and that the deposit of coal dust from the colliery damaged his meat and sausages. The jury found the nuisance as alleged; but that the screening at the defendants' colliery was carried on in a reasonable manner, and in the ordinary way in which such operations were usually carried on in that county. The question was whether this entitled the colliery company to judgment in its favour; or whether they were bound to go farther, and prove that their trade as miners could not be carried on in any other way. The House of Lords unanimously holds the plaintiff entitled to judgment.

Lord Loreburn (p. 639) says:—

> "To my mind it is clear that permission to carry on business is quite a different thing from permission to carry it on in such a manner as to create a nuisance. If, indeed, it could be proved that the business authorized could not possibly, in a practical sense, be carried without committing a nuisance, so that every one must have known the purpose was to commit a nuisance, or if some particular method of carrying it on had been authorized, which being faithfully observed had nevertheless necessarily resulted in an unexpected nuisance being committed, then it would have been different."

[1] The aim of the Editor is to make this feature of the C. L. T. a really complete and conscientious review of recent English decisions likely to be of use to Canadian lawyers, so that readers of it, from month to month, may rely on no important case escaping their notice.

[2] [1915] A. C. 634.

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So Lord Atkinson says (p. 643):—

"From these authorities it is, I think, clear that what must be implied is, not a grant of what is convenient, or what is usual, or what is common in the district, or what is simply reasonable, but what is *necessary* for the use and enjoyment, in the way contemplated by the parties, of the thing or right granted."

Lord Parmoor (p. 646) summarises the law as to the implied grant of easements or rights in the nature of easements, as follows:—

"My lords, the right claimed is in the nature of an easement, and apart from implied grants of ways of necessity, or of what are called continuous and apparent easements,[3] the cases in which an easement can be granted by implication may be classified under two heads. The first is where the implication arises because the right in question is necessary for the enjoyment of some other right expressly granted. The principle is expressed in the legal maxim *Lex est cuicunque aliquis quid concedit concedere videtur et id sine quo res esse non potest.* Thus the right of drawing water from a spring necessarily involves the right of going to the spring for the purpose. The implication suggested in the present case does not fall under this principle; there is no express grant of any right to which the right claimed must be necessarily ancillary, nor is there any evidence that the nuisance is necessarily incidental to the defendants' mining operations. The second class of cases in which easements may impliedly be created depends not upon the terms of the grant itself, but upon the circumstances under which the grant was made. The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be used. But it is essential for this purpose that the parties should intend that the subject of the grant or the land retained by the grantor should be used in some definite and particular manner. It is not enough that the subject of the grant or the land

[3] A continuous easement is a right to do some act of a continuous and constant nature, *e.g.*, the right to a watercourse. An apparent easement is one the existence of which is evidenced by some apparent sign. An easement is non-apparent if no external sign points to its existence, *e.g.*, an alleged right to project the bowsprits of ships when in dock over the land of another owner. See Halsbury's Laws of England, Vol. 11, p. 241.

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retained should be intended to be used in a manner which may or may not involve this definite and particular use."

Employer and Workman—Duty of Employer.—Toronto Power Company v. *Paskwan*[4] is an important decision on appeal from the Appellate Division of Ontario. The point decided,—and no previous decisions upon it are referred to —cannot be better stated that it is in the headnote, namely—

'The duty towards an employee to provide proper plant, as distinguished from its subsequent care, falls upon the employer himself, and cannot be delegated to his servants.'

Sir Arthur Channell, who delivered the judgment, says (p. 738) :—

"It is, of course, true that a master is not bound to give personal superintendence to the conduct of the works, and that there are many things which in general it is for the safety of the workman that the master should not personally undertake. It is necessary, however, in each case to consider the particular duty omitted, and the providing proper plant, as distinguished from its subsequent care, is especially within the province of the master rather than of his servants. In *Cribb* v. *Kynoch*,[5] and *Young* v. *Hoffmann Manufacturing Co.*,[6] the question arose as to the duty of a master to have inexperienced persons in his employ properly instructed in the way to perform dangerous work, and that is a matter which it is fairly obvious must in almost all cases be done for the master by others. The supplying of that which in the opinion of a jury is proper plant stands on rather a different footing. It is true that the master does not warrant the plant, and if there is a latent defect which could not be detected by reasonable examination, or if in the course of working, plant becomes defective and the defect is not brought to the master's knowledge and could not by reasonable diligence have been discovered by him, the master is not liable, and, further, a master is not bound at once to adopt all the latest improvements and appliances. It is a question of fact in each case, was it in the circumstances a want of reasonable care not to have adopted them: see per Willes, J., in *Hanson* v. *Lancashire and Yorkshire R. W. Co.*"[7]

[4] [1915] A. C. 734.
[5] [1907] 2 K. B. 548.
[6] [1907] 2 K. B. 646.
[7] [1872] 20 W. R. 297.

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Railway Company—Personal Inquiry—Exemption from Liability.—Those passages in judgments of the Judicial Committee of the Privy Council in which general principles of law are formulated have preeminent importance in the Dominions. There, it may be presumed, they would outweigh any conflicting *obiter dicta* in a judgment even of the House of Lords. They come with almost the force of clauses in a statutory code. In theory, no doubt, the Privy Council need not follow itself. In theory the Privy Council is advising the King rather than adjudicating as a Court, and why should they repeat advice given by the Council on previous occasions if seen now to be mistaken. As a matter of fact, however, it will, we think, be found that it is only in one or two ecclesiastical cases that the Privy Council have not followed previous judgments, and then only because increased historical knowledge has corrected views formerly expressed. *The Grand Trunk R. W. Co.* v. *Robinson,*[8] contains such a formulation of law as we have referred to. Before setting it out, however, it is right to mention that the main point actually decided by their lordships in this case is that, under sec. 340 of the Dominion Railway Act, (R. S. C. 1906, ch. 37), a Dominion railway company will be protected by a form of contract authorised by the Railway Board giving it complete freedom from liability in the case of negligence, notwithstanding the provision of sec. 284 (7) which enacts—

> 7. Every person aggrieved by any neglect or refusal of the company to comply with the requirements of this section shall, *subject to this Act,* have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servant.

This seems pretty obvious inasmuch as sec. 284 (7) enacts, expressly, '*subject to this Act,*' and the provisions of sec. 340 are very explicit. There were other points in the case, however; but perhaps the chief value of the judgment lies in Lord Haldane's formulation of the general law at pp. 747-8:—

> "There are some principles of general application which it is necessary to bear in mind in approaching the consideration of this question. If a passenger has entered

[8] [1915] A. C. 741.

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a train on a mere invitation or permission from a railway company without more, and he receives injury in an accident caused by the negligence of its servants, the company is liable for damages for breach of a general duty to exercise care. Such a breach can be regarded as one either of an implied contract, or of a duty imposed by the general law, and in the latter case as in form a tort. But in either view this general duty may, subject to such statutory restrictions as exist in Canada and in England in different ways, be superseded by a specific contract, which may either enlarge, diminish, or exclude it. If the law authorizes it, such a contract cannot be pronounced to be unreasonable by a Court of justice. The specific contract, with its incidents either expressed or attached by law, becomes in such a case the only measure of the duties between the parties, and the plaintiff cannot by any device of form get more than the contract allows him.

"A second proposition is that if the contract is one which deprives the passenger of the benefit of a duty of care which he is *prima facie* entitled to expect that the company has accepted, the latter must discharge the burden of proving that the passenger assented to the special terms imposed. This he may be shewn to have done either in person or through the agency of another. Such agency will be held to have been established when he is shewn to have authorized antecedently or by way of ratification the making of the contract under circumstances in which he must be taken to have left everything to his agent. In such case it is sufficient to prove that he has been content to accept the risk of allowing terms to be made without taking the trouble to learn what was being agreed to.

"The company may infer his intention from his conduct. If he stands by under such circumstances that it will naturally conclude that he has left the negotiation to the person who is acting for him, and intends that the latter should arrange the terms on which he is to be conveyed he will be precluded by so doing from afterwards alleging want of authority to make any such terms as the law allows. Moreover, if the person acting on his behalf has himself not taken the trouble to read the terms of the contract proposed by the company in the ticket or pass offered, and yet knew that there was something written or printed on it which might contain conditions, it is not the company that will suffer by the agent's want of care. The agent will, in the absence of something misleading done by his company, be bound, and his principal will be

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bound through him. To hold otherwise would be to depart from the general principles of necessity recognized in other business transactions, and to render it impracticable for railway companies to make arrangements for travellers and consignors without delay and inconvenience to those who deal with them.

"In a case to which these principles apply, it cannot be accurate to speak, as did the learned judge who presided at the trial, of a right to be carried without negligence, as if such a right existed independently of the contract and was taken away by it. The onlv right to be carried will be one which arises under the terms of the contract itself, and these terms must be accepted in their entirety. The company owes the passenger no duty which the contract is expressed on the face of it to exclude, and if he has approbated that contract by travelling under it he cannot afterwards reprobate it by claiming a right inconsistent with it. For the only footing on which he has been accepted as a passenger is simply that which the contract has defined."

The Crown—Jurisdiction of Court—Payment by Executive.—The last case in the July number of Appeal Cases, *The Eastern Trust Company* v. *McKenzie Mann & Co*,[9] is an extremely important one upon the subject of the relation of the Crown to the Courts. Under a certain contract the Government of Nova Scotia was entitled to satisfy all claims for labour and supplies furnished in connection with the construction of a certain railway, out of subsidies payable by it in respect to such construction. In the events which had happened it was alleged that the Government of Nova Scotia had not only made payments which by no latitude of construction could come within the words 'labour and supplies' but that they had also paid a large sum to one R. S. Hervey who had been directly restrained by the injunction of the Court from receiving it. The Judicial Committee, whose judgment was delivered by Sir George Farwell hold (1) that the Court had jurisdiction to determine whether a payment by the Government out of subsidies was in respect of 'labour and supplies' within the meaning of the contract; and (2) that the receipt, though it was from the Government, of money which the recipient had been restrained from receiving was a contempt of Court.

[9] [1915] A. C. 750.

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As to the first point they say (pp. 759-760):—

"The non-existence of any right to bring the Crown into Court, such as exists in England by petition of right, and in many of the colonies by the appointment of an officer to sue and be sued on behalf of the Crown, does not give the Crown immunity from all law, or authorize the interference by the Crown with private rights at its own mere will. There is a well-established practice in England in certain cases where no petition of right will lie, under which the Crown can be sued by the Attorney-General, and a declaratory order obtained, as has been recently explained by the Court of Appeal in England in *Dyson* v. *Attorney-General*,[10] and in *Burghes* v. *Attorney-General*.[11] It is the duty of the Crown and of every branch of the Executive to abide by and obey the law. If there is any difficulty in ascertaining it the Courts are open to the Crown to sue, and it is the duty of the Executive in cases of doubt to ascertain the law, in order to obey it, not to disregard it. The proper course in the present case would have been either to apply to the Court to determine the question of construction of the contract, and to pay accordingly, or to pay the whole amount over to the receiver and to obtain from the Court an order on the receiver to pay the sums properly payable for labour and supplies, as to the construction of which their lordships agree with the Supreme Court of Nova Scotia."

As to the second point their lordships say (p. 760):—

"Although it" (*sc.* the injunction) "could not bind the Government not to pay or make the Government responsible for that obedience to the law which the Court was entitled to expect, the man who received in breach of the order was guilty of a contempt in no way cured by the payment by the Government. . . . Their lordships, with all respect, differ entirely from the statements in Idington, J.'s judgment, that an injunction under which the hand giving may be innocent, and the hand receiving guilty, would be an anomaly not in accord with the policy of the law which developed the power of injunction. Such an injunction is, on the contrary, in accordance with ordinary practice and well-settled principles, and their lordships are of opinion that the order to attach Hervey for contempt was rightly and properly made."

[10] [1911] 1 K. B. 410.
[11] [1912] 1 Ch. 173.

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Revocability of Assignment for Benefit of Creditors before its Execution is Communicated to the latter.—There is a long chain of authorities supporting the decision *Garrad* v. *Lauderdale*,[12] which lay down the rule that it is essential in order to make a deed of assignment for the benefit of creditors irrevocable that its execution should be communicated to creditors. The very recent case of *Ellis & Co.* v. *Cross*,[13] affords a curious illustration of the application of it. A debtor executed a deed of assignment of all his property to a trustee for his creditors and the deed was itself handed to the solicitors for the trustee. Afterwards and on the same day a judgment creditor of the debtor delivered a writ of fi-fa. to the Sheriff. At this time the fact that the deed of assignment had been executed had not been communicated to any creditors. The trustee was not himself a creditor. The Sheriff levied on the goods of the debtor on the following day but not before the trustee had taken possession of the goods. On interpleader the Divisional Courts held that the execution prevailed over the claim of the trustee for creditors, under the above circumstances.

Shearman, J., says (p. 659) :—

"On behalf of the claimant it has been argued that, although the execution of the deed of assignment was not communicated to any creditor, yet, being executed in pursuance of the prior resolutions passed at the meeting of creditors, it was irrevocable although the execution was not communicated to creditors. In my opinion there is no warrant for such a contention. Ever since the decision in *Garrad* v. *Lauderdale* it has been clearly established that a deed of assignment for the benefit of creditors is a voluntary revocable instrument until its execution has been communicated to creditors, and that until communication to and acceptance by creditors the trustee is only a trustee for the debtor. An exception has been grafted on that rule by the decision in *Siggers* v. *Evans*,[13a] where the trustee was himself a beneficiary under the deed, and for that reason the deed was held not to be revocable although its execution had not been communicated to other creditors."

[12] Russ. & My. 451.
[13] [1915] 2 K. B. 654.
[13a] 5 E. & B. 367.

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Stranger in room with Jury — Invalidity of Verdict.—*Goby* v. *Wetherill*,[14] is a decision of a Divisional Court upon the neat point that if a stranger, whether an officer of the Court or not (in this case it was the town serjeant, in whose charge the jury were) is present for a substantial time during the deliberations of a jury, the verdict is vitiated.

Tramway—Passenger ejected from car by conductor.—In *Wolverhampton New Water Works Co.* v. *Hawkesford*,[15] Willes, J., specified the three classes of cases in which a liability may be established founded upon a statute: (1) "One is where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party sueing has his election to pursue, either that or the statutory remedy; the second class of cases is where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, namely, where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it." The recent case of *Whittaker* v. *London County Council*,[16] comes exactly within the first of the three classes thus specified by Willes, J. The English Tramway Act, 1870, sec. 52, provides that any officer or servant of a tramway company may seize and detain a passenger discovered trying to avoid payment of his fare, or wilfully proceeding beyond his proper destination, whose name or residence is unknown to such officer or servant, until such person can be taken before a justice of the peace. What happened in the case was that the plaintiff having entered one of the defendants' tramcars, and travelled some distance, was ejected by the conductor upon the grounds, as found by the jury, that the conductor mistakenly thought that he was endeavouring to travel beyond the point to which his ticket allowed him to travel; that is to say, the conductor thought that the plaintiff was attempting to commit a trespass by remaining in the

[14] [1915] 2 K. B. 674.
[15] 6 C. B. (N.S.) 336, at p. 356.
[16] [1915] 2 K. B. 676.

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car without having paid, and without being ready to pay, his fare, and on that account the conductor ejected him.

A Divisional Court held that the plaintiff was entitled to judgment, the defendants being liable for the wrongful act of their servant. The way in which the Court met the argument that the tramway company could not have delegated to the conductor the power to eject the plaintiff, because it had no such power itself, and that therefore the conductor's act was beyond the scope of his authority and employment is well shewn by the following extract from the judgment of Bailhache, J. (p. 682):—

> "Section 51, it is true, makes the act which the plaintiff was wrongly suspected of doing an offence punishable by a penalty of 40s.; and sec. 52 says that when a tramway authority desires to treat the act as an offence, the offender may be detained by the authority's officer or servant until his name and address are ascertained for the purpose of knowing whom it has to prosecute under sec. 51. But it is not said that that is to be the only remedy which the authority shall have; it appears to me that that is to be in addition to the other remedies which the authority would possess if sec. 52 were not in the Act. One of the most obvious of the other remedies the authority must have is the common law right to treat a person who insists upon remaining in or on a tramcar without paying his fare as a trespasser, and one of the ways in which a trespasser may be dealt with is to eject him, using no more force than may be necessary. The defendants as the tramway authority have a perfect right to do that; and they are not bound to act under sec. 52 and take the trespasser's name and address. If they eject him they do not want his name and address." [17]

Contract for Use of Dock—Exemption Clause in General Words.—Pyman Steamship Company v. *Hull*,[17a] the defendants were the owners of a graving dock which the plaintiffs' ship used under a contract for reward. By the terms of the

[17] Our Ontario Railway Act (R. S. O. 1914, ch. 185, sec. 148), expressly enacts that "every passenger on entering the car or other conveyance, and every passenger who refuses to pay his fare may, by the conductor of the train and the train servants of the company, be expelled from and put out of the train with his baggage, at any usual stopping place or near any dwelling house, as the conductor elects, the conductor first stopping the train and using no unnecessary force."

[17a] [1915] 2 K. B. 729; 84 L. J. K. B. 1235.

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contract the defendants supplied the necessary blocks for supporting the vessel while in the docks. The contract also provided that—'The owner of a vessel using the graving dock must do so at his own risk, it being hereby expressly provided that the company are not to be responsible for accidents or damage to vessel . . . whilst in a graving dock, whatever may be the nature of such accident or damage or howsoever arising.' Owing to the negligence of the defendants the blocks upon which the keel of the plaintiffs' ship rested were uneven in height, whereby she suffered damage, and the owners brought this action. It was contended on behalf of the plaintiffs that although the words of the exemption clause were general words of wide import they should not be construed in this case so as to exclude the liability of the dock owner for damage, because the damage arose in consequence of a neglect of the defendants to provide proper block caps, *and that ought to have been done before the vessel entered the dock,* and that there was a *fundamental obligation, an obligation which went to the whole root of the contract,* to provide block caps in proper position on which the vessel could safely take the ground. The Court of Appeal, however, unanimously held that the defendants were exempt from liability under the above clause. Lord Reading, C.J., expresses the view of the whole Court, when he says at pp. 733-4:—

> "The argument addressed to us was that this obligation to provide block caps was, in the language that has been used for the purpose of the discussion in the cases, a fundamental obligation of the contract. Sometimes it is said it is a primary object of the contract, or it is one of the initial obligations of the contract. I do not propose in deciding this case to discuss the exact meaning to be given to those expressions because it does not arise in this case for our decision. It seems to me that, assuming, as I will for the purpose of the argument, that this obligation to provide blocks and block caps is a fundamental or initial obligation of the contract, the language used in clause 9 is such that we must read it as covering failure to perform any such obligation and covering negligence arising from a want of care in the performance of such obligation."

Misrepresentation in prospectus of company—Liability of directors.—The (Imperial) Companies Consolidation Act 1908, sec. 84 provides, (as do the Company Acts of Ontario,

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Nova Scotia, British Columbia, Saskatchewan, Alberta, and the Yukon) that—'Where a prospectus invites persons to subscribe for shares in . . . a company, every . . . director . . . at the time of the issue of the prospectus . . . shall be liable . . . to all persons who subscribe . . . on the faith of the prospectus for the loss . . . they may have sustained by reason of any untrue statement therein . . . unless it is proved—(a) with respect to every untrue statement not purporting to be made on the authority of an expert, or of a public official document or statement, that he had reasonable ground to believe, and did up to the time of the allotment of the shares . . . believe, that the statement was true. . . .' *Adams* v. *Thrift*,[18] is a decision of the Court of Appeal that the uncorroborated statements of the vendor to and promoter of the company afford by themselves no 'reasonable ground' for believing those statements to be true within the meaning of the above section; neither is the fact that the other directors, after making enquiries, had signed the prospectus before the defendant.

Restraint of trade—Employer and servant.—In our April number, *supra*, p. 334, we noted a case of *Herbert Morris Ltd.* v. *Saxelby* in which Sarjant, J., refused to enforce by injunction a clause in a contract of employment whereby it was sought to restrain an employee for a period of seven years after the termination of his employment from using in competition with the employer the experience and skill which he had acquired during his employment, although he stated that as between a vendor and a purchaser he would have felt compelled to give effect to the contract; for he held that in dealing with the defence of undue restraint of trade it was necessary not only to determine whether the restraint is reasonably necessary for the protection of the master in his business, but to take into account, also, the oppressiveness of the restriction on the servant, particularly from the point of view of the damage done to the public interest by his energies being unduly fettered. This judgment of Sarjant, J., has now been affirmed by the Court of Appeal,[19] Phillimore, L.J., dissenting.

[18] [1915] 2 Ch. 21.
[19] [1915] 2 Ch. 57.

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Cozens-Hardy, M.R., says (pp. 76-7):—

"I do not assent to the argument so strongly pressed upon us as an affirmative proposition, that the only matter to be considered is the interest of the covenantee, and that he is only bound to satisfy the Court that the restraint is not greater than is reasonably required for his protection. . . . I think regard must be had to the interest of the covenantor, and not solely to the interest of the covenantee. . . . There are at least three classes which may require separate treatment: (1) A trade secret may justly be protected by an absolute covenant, without limit as to time or space; (2) the vendor of goodwill ought not to be allowed to derogate from his own grant, and a wide restriction may properly be given to protect the enjoyment by the purchaser of that which the vendor has sold; (3) in a contract of service there is a less freedom of negotiation, and a far greater risk of oppression, and the Court ought to guard more carefully the interests of the covenantor."

And so Joyce, J., says (p. 90):—

"Public policy does not invalidate or interfere with any one precluding himself by agreement from competing in business with particular persons or a particular person so far as may be necessary to enable him to obtain the best price for his own business when he chooses to sell it. . . . But in cases that arise between an employee and a former servant or workman, where the employer seeks to restrict the servant in his future employment the terms of the agreement require to be scrutinized. For it cannot be denied that public policy requires, as a general rule, that a man shall not deprive himself, or the State, of the benefit of his labour, skill, or talent, and at the present time the Court I think (except in cases between vendor and purchaser) is bound to examine critically any agreement which purports to restrict the natural right of every one to practise his calling, whatever it may be, in order to obtain thereby subsistence for himself and to maintain those who may be dependent upon him. And I think it may be taken to be settled at the present day that in considering whether restrictive clauses in an agreement taken by an employer from a person entering his service are illegal or otherwise the Court will and must have regard to the circumstances, position, and rights, natural and legal, of the covenantor, or person employed, and not merely to what is called the protection of the employer. Of course, an agreement or covenant

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purporting to restrict the covenantor in his trade in so far as it may extend beyond what could possibly be of any benefit or advantage whatsoever to the covenantee is inoperative or void. The covenantee would sustain no damage by the breach."

Power of Appointment—Delegation.—We may notice *In re Joicey, Joicey* v. *Elliott*,[20] very shortly by saying that it is a decision of the Court of Appeal that the donee of a power of appointment in a will cannot delegate to others an authority reposed in the donee alone; so far as he may attempt to do so, the provision will be void as being in excess of the power.

CANADIAN CASES.[1]

Payment of taxes as rent—Statute of Limitations.—East v. *Clarke*,[2] was an action for the recovery of land of which the defendant had been in occupation under an agreement with the plaintiff that he might occupy the land until a purchaser was found, he to pay the taxes in the meanwhile as rent. This the Court of Appeal held to be a tenancy at will; and, distinguishing *Finch* v. *Gilray*,[3] that the payment of the taxes under the above agreement amounted to an acknowledgment of the plaintiff's title, and stopped the running of the Statute of Limitations. Garrow, J.A., said, delivering the judgment of the Court (p. 631):—

"Under the agreement the defendant expressly agreed to pay the taxes, not merely as taxes but as rent, and the only rent to be paid for the use of the land. And in paying the taxes he was therefore, primarily at least, performing his part of the agreement, and the circumstance that in so doing he was also discharging an obligation incidentally imposed by the assessment law upon both tenant and owner seems to me to be of no consequence. It would, of course, be otherwise but for the agreement, for it may well be conceded that the mere payment of taxes by an occupant of land would not in itself be an acknowledgment of title or prevent the operation of the statute. And, giving full effect to the decision upon the facts in

[20] [1915] 2 Ch. 115; 84 L. J. Ch. 613.

[1] As most of our subscribers have ready access to the Canadian Reports, it is not deemed necessary to review the Canadian cases in the same detail as the English. Only those which seem of special interest and importance will, therefore, be noticed.

[2] 33 O. L. R. 624.

[3] 16 O. A. R. 484.

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Finch v. *Gilray*, that the same result would follow where there is a specific reservation of another and different sum as rent, I am quite unable to see why, where no other sum is reserved, the parties may not lawfully agree that the tenant shall pay the taxes as rent, nor why the sum so agreed to be paid and paid should not for all purposes be regarded as rent. A contrary conclusion could not, I think, safely rest upon the circumstance that the payments were not to be made directly to the plaintiff but to the assessment officials. The taxes were a charge not merely upon the occupant, but also upon the landlord and his land, under which, in addition to other remedies, if the taxes remained unpaid, the land itself could be sold. If the agreement had been to pay the amount of the taxes into the plaintiff's bank, or to a dependent relative, or a creditor, no one would, I think, suggest that such a payment was not the equivalent for all purposes of a payment directly to the landlord. And I am quite unable to see a substantial difference between the cases so supposed and this."

Covenant not to sublet—Damages on breach.—In *Mayer* v. *David*,[4] a lessee bound himself in his lease not to sublet without the lessor's consent. He did, however, sublet to a Chinaman for purposes of a laundry, in spite of the lessor's protests. The lessor was held entitled to recover as damages rent lost by reason of other tenants leaving the premises, law costs which he had sustained, the cost of cleaning the premises after occupation by the Chinamen, and his own costs of moving out, as he was held under the circumstances justified in doing. The Court below held all these too remote except the cost of cleansing the premises.

Manholes in Public Streets—Responsibility of Municipality.—In *Dame Spedding* v. *The City of Montreal*,[5] it was held that the city being owner of the manholes in the public streets used for the purposes of cleaning the sewers, is responsible in damages to a person who falls into one of them, the cover having been removed by an unknown person. Greenshields, J., held that the onus was on the corporation to clearly account for the improper and dangerous condition of the street; and that the presumption was that the employees of the municipality who alone had the right to touch the

[4] Que. 47 S. C. 516.
[5] Que. 47 S. C. 493.

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cover of the manhole, left it in the dangerous condition in which it was found. Panneton, J., who concurred pointed out that these manholes for cleaning sewers were in a different position from coal chutes which are not to be used by the corporation, nor by the public, but by owners of private property only, and referred to a case of *McTasney* v. *The City of Montreal* in which he held that where a very short space of time elapsed between the opening of the coal chute by the proprietor and the accident, the City could not be held guilty of negligence in not noticing that the coal chute was opened, whereas in such a case as the present one, no one had to use the manhole but the Corporation, and there could be no question of delay in noticing that the manhole was not properly covered. Damages to the amount of $1,000 were awarded the plaintiff.

Land Titles Act (Sask.) — Mortgagee's rights against purchaser of equity.—The Saskatchewan Land Titles Act has a provision not contained in our own, to the effect that 'in every instrument transferring land for which a certificate of title has been granted subject to mortgage or incumbrance, there shall be implied a covenant by the transferee with the transferor *and so long as such transferee shall remain the registered owner, with the mortgagee or incumbrancee* that the transferee will pay the principal money, interest, annuity or rent charge secured by the mortgage or incumbrance. . . ' In *Montreal Trust Company* v. *Boggs*,[6] Lamont, J., held that the effect of this is to give a mortgagee of lands the right to proceed against a purchaser from the mortgagor directly, . . . but that the statute is not intended to compel a transferee of mortgaged land to pay off the mortgage, where, apart from the statute, equity would not have compelled him to indemnify his vendor; also that the effect of the statute is restricted entirely to the case where there has been a real purchase by the transferee and a complete parting with all his interest on the part of the transferor, and does not apply to a case of purchase of only a portion of the mortgagor's interest in the mortgaged premises, in this case, an undivided five-fourteenth interest.

Powers given by Manitoba Enquiries Act—Constitutionality.—In *Kelly* v. *Mathers*,[7] the Manitoba Court of Appeal

[6] 31 W. L. R. 914.
[7] 32 W. L. R. 33.

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has affirmed the constitutionality of the provincial Enquiries Act (R. S. M. 1913, ch. 34). The Act is entitled, 'An Act respecting Commissioners to make Inquiries concerning Public Matters'; and gives the Lieutenant-Governor the right, by commission, to confer upon the commission or persons by whom such enquiry is to be made power to investigate and enquire into (1) any matter connected with the good government of the province; (2) the conduct of any part of the public business thereof; (3) the conduct of any institution therein receiving provincial aid; and (4) the administration of justice, and to that end to summon and examine witnesses. It was sought to apply the decision of the Privy Council in the case under the Australian Constitution of *Attorney-General of Australia* v. *Colonial Sugar Refining Co.*,[8] where it was held that similar legislation in the Australian Royal Commissions Acts was *ultra vires* of the Commonwealth parliament because the enquiries authorised in them were not restricted to any particular subject of legislation or enquiry, and there was no legislation which gave sanction to the enquiries that were being made by the Commission referred to in the case. The Court had, however, no difficulty in distinguishing the position of the Commonwealth parliament with its limited and defined powers, and the powers of our provincial legislature, which although themselves enumerated and defined, contain as Perdue, J.A., points out (p. 46) in No. 16 of sec. 92 of the British North America Act, a general residuary power over 'generally all 'matters of a merely local or private nature in the province.' The Australian Commonwealth parliament contains no such general power of legislation for the peace, order, and good government of the Commonwealth.

[8] [1914] A. C. 237.

A. H. F. L.

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SOME RECENT SUPREME COURT JUDGMENTS,

SUPREME COURT OF CANADA.

MAN.] [MAY 18TH, 1915.

IN RE ESTATE OF ROBERT MUIR; THE STANDARD TRUSTS CO. (EXECUTORS) ET AL. v. THE TREASURER OF THE PROVINCE OF MANITOBA.

Present:—SIR CHARLES FITZPATRICK, C.J., and DAVIES, IDINGTON, DUFF, ANGLIN and BRODEUR JJ.

Constitutional law—Provincial legislation—Succession duties—Taxation—Property within province—Bona notabilia—Sale of lands—Covenants — Simple contract — Specialty — Construction of statute—Severable provisions—R. S. M., 1902, c. 161, s. 5 (Man.)—4 & 5 Edw. VII., c. 45, s. 4 (Man.)—Appeal —Jurisdiction—Surrogate Court—Persona designata.

M., who died in June, 1908, had his domicile in Manitoba and, under a verbal agreement, had erected elevators for L., also domiciled in Manitoba, on lands belonging to the Canadian Pacific Railway Company in the Province of Saskatchewan. Until fully paid for the buildings were to remain the property of M. who was to retain possession and operate the elevators, and all net revenues were to be applied in reduction of the price for which they had been constructed. M. also owned lands in Saskatchewan, known as the "Kirkella Lands," which he had agreed to sell to purchasers under agreements under seal, in his possession in Manitoba at the time of his death, by which he remained owner until they had been fully paid for and then the lands were to be conveyed to the purchasers. The agreements contained no specific covenant to pay the price of the lands. The executors denied the right of the Government of Manitoba to collect succession duties in respect of these debts under the Manitoba "Succession Duties Act," R. S. M., 1902, c. 161, s. 5, as re-enacted by the Manitoba Statute 4 & 5 Edw. VII., c. 45, s. 4.

Per curiam.—The debt due under the contract with L. constituted property within the Province of Manitoba and, as such, was liable for succession duty as provided by the Manitoba statute. Also, Davies, J., dissenting, that under the agreements for sale of the "Kirkella Lands" a covenant to pay should be implied and, consequently, they were specialty debts which, as such, constituted property within the Province of Manitoba and were liable for succession duty there.

Per FITZPATRICK, C.J., and DAVIES, IDINGTON, ANGLIN and BRODEUR, JJ.—The duties imposed by the Manitoba "Succession

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Duties Act" are direct taxation and, consequently, the legislation imposing them is *intra vires* of the provincial legislature.

Per IDINGTON and BRODEUR, JJ.—The provincial legislature is competent to impose taxation as a condition for obtaining the benefit of probate.

Per DUFF, J.—In so far as the statute professes to impose duties in respect of property having a *situs* within Manitoba it is *intra vires* of the provincial legislature. (*Rex* v. *Lovitt* (1912), A. C. 212), followed.

In so far as the statute professes to impose duties on property not having a *situs* in Manitoba, and without respect to the domicile of the owner, the attempted taxation is ineffective as it is not direct taxation within the province and, consequently, *ultra vires* of the provincial legislature. *Cotton* v. *The King*,[*] applied.

Per ANGLIN J.—The succession duties imposed by the Manitoba statute are not fees payable for services rendered, but constitute taxation subject to the restrictions mentioned in item 2 of section 92 of the "British North America Act, 1867."

Per DUFF and ANGLIN, JJ.—The provisions of the Manitoba "Succession Duties Act," in respect to taxation which may be *ultra vires* may be construed severably and do not render the statute ineffective as a whole.

IDINGTON and ANGLIN, JJ., questioned the jurisdiction of the Supreme Court of Canada, under sub-section (*d*) of section 37 of the "Supreme Court Act," to entertain an appeal in a matter or proceeding originating in the Surrogate Court of Manitoba.

ANGLIN, J., suggested that in the proceedings provided for by section 19 of the Manitoba "Succession Duties Act," the Judge of the Surrogate Court would act as *persona designata* and that there may not be an appeal from his order to the Supreme Court of Canada.

The judgment appealed from (24 Man. 310), was affirmed.

Appeal dismissed with costs.

W. R. Mulock, K.C., for the appellants.

Wallace Nesbitt, K.C., and *R. B. Graham*, for the respondent.

[*] [1914] A. C. 176.

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SUPREME COURT OF CANADA.

ONT.] [JUNE 24TH, 1915.

VIVIAN & CO. v. CLERGUE.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Present:—SIR CHARLES FITZPATRICK, C.J., and DAVIES, IDINGTON, DUFF, ANGLIN and BRODEUR JJ.

Contract—Sale of mining land—Substituted purchaser—Reservation of claim against original purchaser — Forfeiture of second contract—Sale of land to other parties—Effect on reserved claim.

In June, 1903, V. & Co., by agreement in writing, contracted to sell, and C. to buy, mining property for $125,000, to be paid $5,000 down and the balance in annual instalments of $24,000. The $5,000 was paid and in March, 1905, when an instalment was overdue and the second accruing, a new agreement was executed, to which C. was a party, for sale of the property to a mining company for the same price and on the same terms. This agreement provided that nothing in it should affect the right of the vendor to claim from C. the amount payable under the original contract up to March, 1905, otherwise the latter was to be merged in the new contract. The mining company made default in their payments and, as provided in their contract, the vendors gave notice that the contract was at an end and, later, sold the property for $75,000. They then took action against C. for the amount unpaid on the original agreement and recovered judgment. After the final sale of the mine C. applied for and obtained from a judge an order declaring that V. & Co. were not entitled to enforce their judgment against him except for costs. On appeal from the affirmance of this order by the Appellate Division:

Held, affirming the decision of the Appellate Division (32 Ont. L. R. 200), that, by extinguishing the interest of the mining company in the land and then selling it, V. & Co. had put it out of their power to place C. in the position he was entitled to occupy on making payment and had thus disabled themselves from enforcing their judgment.

Appeal dismissed with costs.

W. M. Douglas, K.C., and *Lefroy, K.C.*, for appellants.
Shepley, K.C., and *H. S. White*, for respondent.

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SUPREME COURT OF CANADA.

N.S.] [JUNE 24TH, 1915.

EVANGELINE FRUIT CO. v. PROVINCIAL FIRE INSURANCE CO.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Present:—SIR CHARLES FITZPATRICK, C.J., and DAVIES, IDINGTON, DUFF and ANGLIN, JJ.

Fire insurance — Statutory conditions — Gasoline "stored or kept" on premises — Supply kept near building—Material circumstance—Non-disclosure.

By a condition in a policy of insurance against fire the policy would be void if more than five gallons of gasoline were "kept or stored" at one time in the building containing the property insured.

Held, that keeping, 15 or 16 feet from said building, under an adjacent platform a barrel of gasoline for supplying the quantity required for daily use was not a breach of such condition.

Held, also, reversing the decision of the Supreme Court of Nova Scotia (48 N. S. Rep. 39), that as the company, when issuing the policy, knew that a gasoline engine had been installed in the building for use in manufacturing, and must be deemed to have known that a reasonable supply of gasoline for feeding it would be kept close at hand, the keeping of the barrell where it was placed was not a circumstance material to the risk, non-disclosure of which would void the policy.

Appeal allowed with costs.

Roscoe, K.C., for appellants.
Newcombe, K.C., for respondents.

SUPREME COURT OF CANADA.

N.S.] [JUNE 24TH, 1915.

CAPITAL LIFE ASSURANCE CO. v. PARKER.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Present:—SIR CHARLES FITZPATRICK, C.J., and DAVIES, IDINGTON, DUFF and ANGLIN, JJ.

Life insurance—Non-payment of premiums—Misrepresentation to insured—Estoppel.

P., in payment of premiums on a life policy, gave his note for one instalment and an overdue balance of another. Shortly

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before it matured an official of the company, specially authorized to deal with the matter, informed P. that his policy had lapsed owing to the inclusion in the note of the overdue balance which was against the company's rules. In consequence of this representation P. did not pay the note nor tender the amount of another instalment falling due before his death. In an action on the policy by the beneficiary no rule of the company was proved avoiding the policy as stated.

Held, affirming the judgment appealed from (48 N. S. Rep. 404), Fitzpatrick, C.J., and Davies, J., dissenting, that the company was estopped, by conduct, from claiming that the policy lapsed on nonpayment of the note and subsequent instalment.

Per FITZPATRICK, C.J., and DAVIES, J.—That the non-payment of the note could not be relied on as avoiding the policy, but the estoppel did not extend to the effect of failure to pay the portion of the premium which afterwards became due.

Appeal dismissed with costs.

J. J. O'Meara, for appellants.
Mellish, K.C., and *Findlay MacDonald, K.C.*, for respondent.

SUPREME COURT OF CANADA.

ONT.] [JUNE 24TH, 1915.

UNION BANK OF CANADA v. A. MCKILLOP & SONS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Present:—SIR CHARLES FITZPATRICK, C.J., and DAVIES, IDINGTON, DUFF and ANGLIN, JJ.

Company law—Trading company—Powers—Contract of suretyship—R. S. O., 1897, c. 191.

An industrial company incorporated under, and governed by, the "Ontario Companies Act," R. S. O., 1897, c. 191, has no power to guarantee payment of advances by a bank to another company whose sole connection with the guarantor is that of a customer, and such contract of suretyship is *ultra vires* and void.

Judgment appealed from (30 Ont. L. R. 87), affirmed.

Appeal dismissed with costs.

H. Cassels, K.C., for appellants.
C. A. Moss and *J. B. McKillop*, for respondents.

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CONTEMPORARY LEGAL REVIEWS AND PERIODICALS.

The *Law Notes* (English) for August well observes with reference to the National Register Act—

> 'There is a general idea that there is something very wrong and unjust about the present working of the voluntary system, and this new Act is at any rate an attempt to deal with the injustice and wrongs which are seen on all sides—married men going while single men stay at home—men between thirty and forty enlisting while those between twenty and thirty are skulking in their tents—an only son offering himself though to the breaking of his mother's heart at No. 1, Amen Road, while at No. 2 of the same road, a mother of four strong and active sons will not let one of them leave her, and so on, and so on. Yes, yes, something had to be done, and we must now all watch with interest the working of this new law.'

The *Law Journal* (English) for August 7th, says of the retaliatory Imperial Order in Council of March 11th last,—against which the American Government have protested in so far as it made liable to capture American-owned goods passing from a neutral port like Rotterdam to a neutral port of the United States on the ground that the goods came originally from Germany or territory occupied by German troops:—

> 'Admittedly the Order involves an extension of recognised belligerent rights over neutral trade, because hitherto it has been laid down that a blockade can only be enforced against vessels and goods proceeding to or from the enemy's coasts. But Sir Edward Grey contrives with great force to shew that the modification of the rule by cutting off commerce with the enemy country proceeding to or from neutral ports neighbouring to the enemy territory, is a reasonable and valid development of the fundamental principle that, by means of blockade, a belligerent is entitled to intercept by effective means the sea-borne commerce of his enemy. . . . The special ground on which the British claim to arrest any goods going to or from Germany is rested is retaliation against the enemy's policy of sinking all vessels, whether belligerent or neutral, which approach the British shores. But apart from the plea of retaliation, the case for extended blockade may be more firmly based upon the rea-

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sonable development of the principles of belligerent restraint upon neutral commerce which the substitution of railway for oversea communication in international trade has necessitated.'

A propos of the fact that Ministers of State are not allowed by the American Constitution to be members of either House of Congress, and, therefore, are not present there to be questioned as to matters of administration, President Wilson says, in his little classic on *Congressional Government* that 'the only really self-governing people is that people which discusses and interrogates its administration.' The (English) *Law Times* for August 7th, has some interesting information on the history of the British parliament in this respect. It says:—

'The earliest formal question addressed to a Minister was asked on February 9th, 1721, when Lord Cowper put a question in relation to administration which was answered by the Earl of Sunderland. It was not, indeed, till 1848 that a special place was assigned to questions on the notice paper. . . . The extraordinary development of the practice of questions in the House of Commons may be realised by the fact that in 1901 there were 6448 questions as against 129 questions in 1847. "Asking questions" is a modern method, developed by recent Parliamentary practice, of supervising the general policy and administrative acts of the Government. . . . Further they are often arranged by the Government itself so as to give them an opportunity of making announcements in a somewhat informal way.'

An incurable spirit of frivolity leads us to recall in this connection the story of an English member of Parliament who addressing his constituents on a recent occasion, sought to impress them with his activity on their behalf by stating that during the last session, he had asked no less than two hundred questions of the Government. Whereupon a voice from the gallery exclaimed—"What an hignorant hass you must be."

The Solicitors Journal and Weekly Reporter for July 31st contains an editorial on the appropriation of land for military purposes under the Defence of the Realm Act. The right of the Crown to so appropriate lands arose in the recent case of *Re a Petition of Right of X* which went to the

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English Court of Appeal. It was held on appeal that where the Crown takes possession of private lands for military purposes no compensation can be claimed as of right in legal proceedings, although the case is a proper one for the voluntary assessment of compensation by the Parliamentary Committee established for that purpose. The Court held that the right to appropriate lands for military purposes did not rest on statute alone but was an ancient prerogative of the Crown, having been so declared in the *Magdalen College Case*,[1] where it was held that the Crown had a right to enter upon the college grounds and erect fortifications necessary for the defence of the realm. In an older decision, the *Case of Saltpetre*,[2] the Crown successfully asserted its rights to enter upon private property for the purpose of digging for saltpetre, an essential ingredient of gun powder at that time. In the present case it was argued that as the lands were required for aerodromes the common law did not apply, since aerodromes were unknown to the common law. The natural reply to this contention was that such rights must undergo a reasonable development in accordance with the changing conditions of the age. In addition to establishing the fact that the royal prerogative, in such a case, is not obsolete, the decision affirmed that the right exists in time of war notwithstanding the fact that there might not be an invasion by the enemy, either actual or threatened. "To postpone action," said the Master of the Rolls, "until the enemy had landed or until the authorities were satisfied that a landing in a particular neighbourhood was imminent, would, or might be fatal to the security of the realm."

The *Law Notes* (Northport, N.Y.) for August, under the title of 'Is There a War in Europe?' refers to a recent case in the New York Courts in which the defendant pleaded that it had become impossible for him to carry out his contract with the plaintiff owing to a state of war existing between Germany, Austria and Turkey on the one side, and England and her allies on the other. The presiding judge refused to take judicial notice of the fact that such a state of war existed, and it became necessary to produce documents properly certified from the State Department at Washington to prove the fact. In support of the judge's ruling the English

[1] (1615) I. Roll. Rep. pp. 151-2.
[2] (1606) 12 Co. Rep. 12.

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case of *Dolder* v. *Lord Huntingfield*[3] was cited, wherein Lord Eldon in 1805, without giving any reasons, compelled a litigant to prove that France was at war with Austria. Wigmore in his book on Evidence states that "the external political facts of international affairs, as distinguished on the one hand from the common international law and on the other hand from the domestic political facts of the forum of the Court, cannot be said to be made the subject of judicial notice." The writer of the Article adds that, 'If these authorities are to be considered as controlling on a Court, the result is the exaltation of a rule of law above the sense and reason of the judge himself, the jury, the very attorney, doubtless who demands the proof, and in fact every one present at the trial.'

In this same number an interesting question of privileged communication is discussed. Judge Lindsey of the Juvenile Court of Denver was summoned to appear at the trial of a woman accused of the murder of her husband and was asked to disclose communications made by a child, the son of the accused, in the Juvenile Court. The judge refused to disclose the confidences of the child on the ground that as judge of the Juvenile Court he fills a peculiar capacity; that under the law of Colorado he is custodian of every child that is a ward of the Court and of every child against whom a complaint has been filed. To violate the confidence reposed in him by disclosing communications made to him in such a capacity, would be contrary to public policy and the whole doctrine of the law in reference to privileged communications. Moreover, if a Juvenile Court judge is to be compelled to disclose communications made to him in his capacity of judge, the confidence hitherto reposed in the Juvenile Court will be impaired if not destroyed. In support of Judge Lindsey's contention, the writer cites the case of *People* v. *Pratt*.[4] Here a witness had been summoned to give evidence before a grand jury. Fearing that certain bribery charges with which he was connected were to be investigated, he sought the advice of the presiding judge and insisted on making a confession, although advised by the judge to consult counsel. In a subsequent prosecution of the witness for

[3] 11 Ves. 292.
[4] 133 Mich. 125.

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bribery, the Court held that the communication made to the judge was privileged.

The Law Magazine and Review for August contains a long and learned Article upon *The Commission of Lieutenancy in the Counties: Its History and Functions,* by Hugh H. L. Bellot, who shews that the office, if not the name, of Lord-lieutenant of the county may be traced to a very remote antiquity. The actual name 'lyvetenante' is first mentioned in an Act of Parliament of 1549—3-4 Edw. VI. ch. 5, sec. 7. By Act of 1871 the military functions of the lord-lieutenants of English counties practically disappeared, but were revived by the Territorial and Reserve Forces Act, 1907, under which for the purposes of the reorganisation of the military forces, other than the regulars and their reserves, and of the administration of such forces, and for other kindred purposes, county associations were established, and it is provided that the lord-lieutenant of the county, or failing him, such other person as the Army Council may think fit, shall be constituted president of each county association. Thus the lord-lieutenant has been replaced in his former position of military responsibility wherever he chooses to exercise his option of assuming the presidency of his county association.

We also have in this number of the *Law Magazine* a timely Article, under the *nom de plume* of *Jus* on *The Effect of War on instalment deliveries.* The writer asks the question—

> 'What are the rights of an English manufacturer who before the war entered into a contract in England to supply a German or Austrian merchant with goods, to be delivered by instalments extending over a number of years, and which contract, in the ordinary course of events, might have come to an end during the continuance of the present war or not until after the determination thereof?'

Probably some Canadian merchants or manufacturers are faced by the same problem. After dealing at considerable length with the decisions, the writer comes to the following conclusion:—

> 'The effect of the above decisions as to contracts for instalment deliveries which have been entered into before the war, but which were unexecuted at the time when war was declared, and of which the execution has been ren-

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dered unlawful or become impossible, is that the parties are released from further performance thereof, and from thenceforth are free from all obligations thereunder—in other words, such contracts are dissolved or abrogated. Any right of action which has accrued to an alien enemy before war has been declared is suspended. The outbreak of war, however, does not suspend an action in which an alien enemy is defendant.'

Following the above is a long Article by Mr. W. E. Wilkinson, (who contributed an Article to the May number of the CANADIAN LAW TIMES upon English Emergency legislation) upon the interesting subject of the relation between *International Law and the Law of the Land.* We can only notice the general conclusions at which he arrives:—

'The general conclusions which we may draw as to the relations of International law to the law of England may be summarised under four heads as follows:—

(i) International law may have been adopted into English law so as to form an integral part of it in the manner described in the judgment in *The West Rand Central Gold Mining Co.* v. *Rex*,[5] e.g., by custom or by statute. In such a case, the rules of International law so adopted are enforced by the English Courts, not as International law, but as parts of the law of England.

(ii) International law may conflict with English law. In such a case, although there may be an international liability on the State for its failure to fulfil its international duties, yet English Courts must apply their own law and cannot apply those rules of International law which have not been adopted.

(iii) There may be no actual conflict between the rules of International law and those of English law, but there may be a gap in English law so far as the particular matter under discussion is concerned. In such a case, it is submitted, on principle, as the particular rules of International law have not been adopted into English law, English Courts cannot apply such rules.

(iv) All Acts of Parliament and Orders in Council will be construed with the presumption that no violation of International law is intended.'

The remaining Article in the *Law Magazine* is on *Submarine Piracy.* Then follow the usual valuable *Current Notes on International Law, Notes on Recent Cases*: (*English and Irish*) and *Reviews* of new publications.

[5] [1905] 2 K. B. 391.

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We have before us the *Central Law Journal* (St. Louis, Mo.) for May 21st, and July 2nd, 9th, 23rd, and 30th. We note from the first the interesting fact that the State of Illinois 'possibly adheres more strictly to the common law forms of procedure than any other State in the Union,' but that the Illinois Bar Association has for a number of years endeavoured to bring about a reform in procedure, and that Mr. Edward C. Kramer, the President of the Association thinks that—

> 'The following good reasons can be urged in favour of adopting the English Judicature Act:—
>
> 1. It accomplishes the reforms desired.
> 2. It only undertakes to form basic rules by legislation and leaves the remainder to be accomplished by rules of Court, thus entrusting the important matters in procedure and practice to a tribunal that is capable of handling them and is always open for action.
> 3. The Act itself and the rules adopted under it have been construed by the English Courts and we can have the benefit of such construction.'

"The melancholy Missouri," as Mr. Bryce calls her, because she alone among the States does not include in her Constitution the statement that—'All men have the natural right to pursue happiness,' evidently has some claims to be able to "show" other people, for we notice in the *Central Law Journal* for July 2nd, a long Article on certain drastic statutes recently passed by the legislature to stop the unlawful practice of the law by unlicensed persons.

We notice in the *Scottish Law Review* for August some interesting *Notes from London* in which the writer remarks that conveyancers, both barristers and solicitors, are the lawyers where practice has suffered most by the universal upset of customary life; and that this is all the more striking when it is considered that between three and four thousand solicitors and others connected with the branch which does most of the conveyancing have given up their work for soldiering.

The *Law Journal* (English) of August 14th, maintains that 'to the advocate, whose province is the study of character, a fine play or novel may be of far greater service than any law book on his shelves,' and cites in support the following

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passage in an address delivered by the President of the Chicago Bar Society at the North-Western University Law School some few years ago:—

> 'I think I learned more of human nature (outside of my own experience) from Balzac than I have from any other author except Shakespeare. I recall especially *Eugenie Grandet,* the history of a miser. I have read that book two or three times, and this is how it profited me afterwards. I was retained in a very serious case of fraud. I studied the party on the other side. I made up my mind that if ever there were a miser out of the pages in literature, that was the man, and that Grandet was his literary father-in-law. I studied *Eugenie Grandet* again, and then I attacked that opponent. It was an eight years' task. But the image of Grandet helped me to hound that man so, that at the end of eight years, there was not anything left but his hide. The greatest admirer of the work I did is the man's own lawyer; but he will not give me credit for having any legal acumen. He maintains that I knew all the facts beforehand. Yet the truth of the matter was that I did not; I drew the bill before I had the facts. I merely judged the man's character from what I had read of *Eugenie Grandet.*'

We must conclude with the following interesting extract from the (English) *Law Times* of July 31st:—

> 'The reception accorded to Sergeant O'Leary, V.C., on the 19th inst. in the House of Commons, where his presence caused great enthusiasm, is an interesting illustration of the progress of public opinion in recognition of the high status of the rank and file of the British Army, where courage sheds lustre on these countries. Sergeant O'Leary, after he held, what has been termed in the lay Press, a levee in the Lobby, was accorded a seat in the Distinguished Strangers' Gallery, and, when there, was joined by Mr. Bonar Law, who left the Treasury Bench for the gratification of speaking to him for a few moments. This incident acquires an enhanced interest by way of poignancy of contrast with a military incident in the House of Commons just sixty years ago. "On the 3rd August, 1855," writes Sir Erskine May, who was probably present at the time as Clerk at the Table, "notice was taken that two soldiers in uniform lately returned from the Crimea had been refused admission to the Strangers' Gallery. The Speaker stated that there was no rule for their exclusion, and soldiers in uniform, but unarmed, have since been freely admitted."'

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We have also received the latest numbers of the *Insurance Law Journal* (New York); the *New Jersey Law Journal;* the *Queensland Justice of the Peace;* the *Scots Law Times;* the *Irish Law Times and Solicitors Journal;* the *Australian Law Times;* the *Solicitors Journal and Weekly Reporter* (English); and our exchanges from British India whose titles we enumerated in a recent number.

NEW BOOKS AND NEW EDITIONS.

Workmen's Compensation and Insurance Reports, Part 2, with Annotated Digest, containing all cases in the House of Lords, Court of Appeal (England), Court of Session (Scotland), Court of Appeal (Ireland); germane to Workmen's Compensation, Employers' Liability, Insurance (all branches except Marine), National Insurance. Edited by W. A. G. Woods, L.L.B., Barrister-at-Law, sub-editor of the Law Journal Reports and reported by members of the staff of the Law Journal Reports. Annotated index by Gilbert Stone of the North-Eastern Circuit, Barrister-at-Law, B.A., L.L.B., part author of Stone's Insurance Cases, etc., etc. London. The Reports and Digest Syndicate, Ltd., 14 Bell Yard, Temple Bar. (Stevens & Sons, Ltd.: Sweet & Maxwell, Ltd.: Canada Law Books Co., Ltd.) Subscription for 1915, 15s. (postage 1s. extra).

We have also received the following reports from the Dominion Government.

Monthly Report of the Department of Trade and Commerce of Canada, April, 1915.

Report of the Minister of Agriculture for the Dominion of Canada for the year ending March 31st, 1915.

Twenty-seventh Annual Report of the Factory Inspection Branch Department of Agriculture, Province of Ontario, 1914. (Published by the Ontario Department of Agriculture.)

Trade and Navigation Unrevised Monthly Statement of Imports entered for Consumption and Exports of the Dominion of Canada, June, 1915. The figures published in this Report are, as far as possible, revised each month. Those which appear in this issue consequently supersede any contained in previous issues. Compiled at the Customs Department, Ottawa, from Official Returns and Printed by Order of the House of Commons (13th July, 1900), under the direction of the Minister of Customs.

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THE GAZETTES.

The Canada Gazette of August 7th contains an Order-in-Council proroguing the Dominion parliament until September 18th.

Also an Order-in-Council applying Part XII. of the Canada Shipping Act to the Port of Dipper Harbour, New Brunswick.

The Canada Gazette of August 14th contains an extract from *The London Gazette* of July 24th last shewing that His Majesty has awarded the Military Cross for gallantry and devotion to duty in the Field to Second Lieutenant Lawrence Hilgrove McCormick, 1st Battalion, the Prince of Wales' Leinster Regiment (Royal Canadians).

It also contains an Order-in-Council of August 12th prohibiting the exportation of all goods from Canada to Bulgaria, also of a long list of articles to any destination other than parts of the British Empire, France, Italy, Russia (except Baltic ports) Japan, and the United States when for consumption in the United States only, or shipped to specified consignees in the United Kingdom *viâ* the United States, or exported *viâ* the United States under license or dispensation from Canada.

The Canada Gazette of August 28th contains an Imperial Order-in-Council adding raw cotton, cotton linters, cotton waste and cotton yarn to the list of articles to be treated as absolute contraband of war.

The Saskatchewan Gazette of August 14th contains a Proclamation of the Lieutenant Governor-in-Council under statute made for the protection of the property and interests of debtors of all classes, including volunteers for active service and reservists, providing that, except in case of abandonment, no oxen, horses, mules, cows, sheep, pigness, harness, wagons, or farm implements, belonging to a debtor or in his possession by virtue of a conditional sale, lien agreement or hire receipt, shall during the continuance in force of the proclamation be seized or sold under a chattel mortgage or bill of sale intended to operate as a mortgage, or under such conditional sale, lien agreement, or hire receipt, without the consent of the sheriff of the judicial district within which

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the property is situated; and every such seizure or sale shall be made by the sheriff. And before approving of a seizure or sale, the sheriff shall 'take into consideration all the circumstances of the case, including among other things, the financial position of the debtor, the amount of the indebtedness, the nature of the chattels and their value, the prospect of realising a fair proportion of the value, the time of year and the degree of hardship which may probably be caused to the debtor by the seizure and sale.' The Sheriff's discretion in so approving or withholding approval, or in postponing a sale, is to be absolute. Severe penalties are imposed on those who seek to contravene these provisions.

The British Columbia Gazette of August 19th, contains the Game Regulations 1915, made by the Lieutenant-Governor in Council under the provincial Game Act.

LOCAL AND PERSONAL.

Mr. F. W. Willson, of the firm of Moncrieff and Willson, of Petrolea, has been appointed police magistrate at Petrolea.

The Vancouver Bar Association has forwarded $2,000 to the acting Minister of Militia, with the request that the department purchase one machine gun for the 7th Battalion and one for the 16th Battalion.

Mr. Joseph G. de Lorimier, of the firm of Angers, de Lorimier, Godin, and de Lorimier, Montreal, was among passengers rescued from the Arabic.

The Honourable L. P. Pelletier, late Postmaster General in the Borden Cabinet, has been promoted from the Superior Court of Quebec to the King's Bench, where he succeeeds the late Mr. Justice Honore Gervais.

We regret to see the death reported of Mr. Duncan C. McLeod, K.C., late of the firm of McLeod and Bentley, Charlottetown, P.E.I., at Charlottetown, on August 10th last; also of the following law students from Vancouver, B.C., killed in action:—

William John Bowser, Jr., of Vancouver.
John William McDonald, of Breadalbane, P.E.I.
Eric George Johnson Dunn, of Penticton, B.C.
Frank Wendell Stacey, of Moosejaw, Sask.

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The Canadian Law Times.

VOL. XXXV. OCTOBER, 1915. No. 10.

BY THE WAY.

Mr. James Crankshaw, K.C., was born in Manchester, England, in 1844. He came to Canada in 1876, and subsequently took the degree of B. C. L. with honours at McGill University. He was not, however, called to the Bar of Quebec Province until 1884. In 1896 he was appointed K.C. by the Quebec Government. Mr. Crankshaw is best known as the author of a work on the *Criminal Code of Canada and Canada Evidence Act*, to successive editions of which he has devoted many years of his life. Although over seventy years of age, he has now had the energy and industry to produce a new edition of this book, which is by common consent acknowledged to be the most useful work of its kind which the practitioner can have. We hope to notice this new edition at greater length in a future issue. We published a short Appreciation of the author in our number for February last. Mr. Crankshaw is also the author of *'A Practical Guide to Police Magistrates and Justices of the Peace.'*

The *Law Journal* (English) of August 28th, last, has this about the Solicitor-General: 'Sir F. E. Smith, K.C., M.P., of the Queen's Own Oxfordshire Hussars, has been promoted a lieutenant-colonel. It is the first case on record of a Solicitor-General, being at the same time a lieutenant-colonel.' We can supply a somewhat parallel case from the annals of this province. In 1812 John Beverley Robinson was a lieutenant in the 3rd Regiment of York Militia. Two days after the battle of Queenston, in which he took part, being sent with a number of prisoners to Toronto, he was met at the wharf at Niagara by the news that he had been appointed Attorney-General.

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Those of our readers who have possessed themselves of, and studied Mr. C. C. McCaul, K.C.'s recently published *Notes on the Remedies of Vendors and Purchasers of Real Estate,* or even read our comments upon the merits of that addition to Canadian text-books in our issue for June last, will we are sure welcome the first instalment, which we publish in our present number, of an Article by him on *Options to Purchase Land.* The activity of late years in dealings with land in our North-Western provinces has naturally led to a large number of cases arising in the Courts of those provinces on the law relating to such subjects as options to purchase, and specific performance of contracts for the sale of land, and to a consequent development of the law relating thereto, in which Mr. McCaul has taken a prominent part. We esteem ourselves very fortunate in securing his contribution to our pages.

We also call attention to what we claim to be a very valuable Article in our present issue by Mr. F. W. Wegenast on the still vexed question of the respective jurisdictions of the Dominion and the provinces in the matter of the incorporation of companies. Mr. F. W. Wegenast was of Counsel, and won a notable forensic victory before the Privy Council, in the *John Deere Plow Company case,* on the judgment in which we commented at length in our February number. Mr. Wegenast's views, therefore, in relation to the above subject are of very special value. The outstanding points of interest in his Article perhaps, are the stress he lays upon the fact that the John Deere Plow Company was a trading company; and his suggestions that objects of a company may, apart from territorial restriction to the limits of a province, be so inherently 'provincial' that the Dominion could not claim the right to incorporate a company with such objects merely by extending the area of the company's permitted operations to two or more provinces.

With reference to the account given by Mr. Justice Riddell in his interesting paper in our last number upon *The Duel in Early Upper Canada* of the duel in 1833 between Robert Lyon, law student, and John Wilson, also a law student, but who ultimately was appointed to the Bench in the Court of Common Pleas as a puisne judge, Judge Riddell has been good enough to permit us to publish the following

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extract from a letter received by him from one of our County Court judges since the appearance of his paper:—

> "Some years ago an old member of the Bar,—Mr. W. H. R. Allison, Q.C., late of Picton, Ontario,—told me that he remembered Judge Wilson holding Assize at Brockville. He had made an appointment to see the judge at his hotel the evening of his arrival, and on calling found the judge suffering, with every evidence of intense grief—the tears were still plainly visible on his face. My friend said he began to back out with an apology but the judge stopped him. On a suggestion that the judge was ill he said he was not, but was completely overcome by the memory of the fact that the last time he was in Brockville he was *tried for murder*. The judge then relates the history of the duel much as you have described it."

The *Round Table* for September takes special notice of the International Joint Commission, which has for sometime past been meeting periodically at Washington, engaged in the effort to settle questions pending between the United States and Canada, which might otherwise occasion serious controversy between the two countries. Under the Treaty constituting it, the Commission can prevent any misuse of the boundary waters between the United States and Canada. Without its approval no obstruction, diversion or use of boundary waters or of waters flowing from boundary waters can be made on either side which affects the natural level or flow on the other side. The decisions of the Commission on such matters are final. No appeal against them can be taken either by an individual or a Government. Then again on the request of either country the commission can, by Article IX., examine into any question concerning the frontier, or in the words of the treaty—'any questions or matters of difference arising between the High Contracting Parties involving the rights, obligations, or interests of either in relation to the other, or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada;' while with the consent of both countries it can decide under Article X., 'Any questions or matters of difference arising between the High Contracting Parties involving the rights, obligations, or interests of the United States, or of the Dominion of Canada, either in relation to each other or to their respective inhabitants.' The writer in the *Round Table* states that since the organ-

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ization of the Commission in 1912 several cases affecting boundary waters have come before it for decision and have been disposed of harmoniously and to the satisfaction of both countries, while two far-reaching investigations under Article IX. are being carried on to result in reports which may be the basis for an amicable and final disposition of the controversies involved. None of the possibly wider questions contemplated by Article X. has yet been presented to the Commission for the simple and satisfactory reason that none has arisen. As the *Round Table* states, this is an interesting experiment in adjusting differences between States by peaceful methods. It might be thought, perhaps, to deserve more public attention than it has received, were it not that it is probably in the public interest to let the Commission pursue its beneficent work, so far as possible, unproclaimed and undisturbed.

Those who failed to hear the very eminent lawyer and ex-Minister at the Court of St. James, Mr. Rufus Choate, at the Convocation of the University of Toronto on the 28th inst., when honorary degrees were conferred upon him and other distinguished representatives of the American Peace Centenary Committee, missed a rare treat. It was not only what he said, but also his personality, urbanity, and wit, which were delightful. Though, as we were informed, in his ninth decade, his voice was full and musical. We take off our hat to the *Globe* for being, we think, the only morning paper which reproduced the sly dig at the reporters with which he opened his speech and brought down the house:—"I was set upon this morning by a great body of the reporters of Toronto, and I was struck with their wonderful gallantry and dash and the energy of their onset, *and I thought they ought to be in the trenches,* and for a moment I wished they were. They wanted to know what I was going to say this afternoon, and I was obliged to tell them that during a long lifetime I had cultivated the habit of speaking without saying anything. So they got nothing out of me."

Perhaps his most notable utterance was the following:—

> "I have little confidence in, although much sympathy with, all the schemes that are on foot for promoting peace; but it is no use crying 'Peace, peace, when there is no peace,' and no possibility of peace—(applause)—no possibility of peace until the authors of this awful war

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are brought to a condition where their adversaries and the whole world can see that hereafter they will obey our rule, the rule of good faith, the rule of keeping contracts, the rule that when they make a treaty they should stand by it, whether it is to their interest or not, and prevent this awful code of law which has governed the world during the last twelve months: that whenever their interests required they could throw all treaties and contracts to the winds."

Mr. Choate expressed his full sympathy "wherever men are fighting for liberty and justice and civilization"; and said that he believed that of the hundred millions of his countrymen at least ninety millions were in fully sympathy with him on that point. As to those of another way of thinking he said:—

"Of course there are a few, shall I say, malignants. I do not wish to use any offensive words, but we have many millions of men of foreign descent, one-half of them on one side and one-half on the other. But if we should go to war with you against an unspeakable enemy —I do not want to mention its name—I think nineteen-twentieths of all those people would stand by our flag, the Stars and Stripes."

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OPTIONS TO PURCHASE LAND.

INTRODUCTORY.

In *Carey* v. *Roots*,[1] Simmons, J., quotes Williams on Vendors & Purchasers, and refers to *London and S. W. Ry.* v. *Gomm*,[2] in support of the proposition that an option-contract creates an interest in land; and that it is within the purview of the 4th section of the Statute of Frauds; and he approves of the practice of registrars under the Land Titles Act registering *caveats* for the option-holders.

In *Woodall* v. *Clifton*[3] (which curiously enough I cannot find discussed in any of the later cases) it was held by the Court of Appeal that an option to purchase the fee simple contained in a lease did not come within the statute 32 Hen. VIII., ch. 34, so as to make the liability run with the reversion. The first sentence in the judgment of the Court (per Romer, L.J.), is:—

"A contract in a lease giving an option of purchase might be good, without regard to the statute of Henry VIII., as binding the land in the hands of the heirs or assigns, provided it did not infringe the law as to perpetuities. It would not be the less a binding contract because it was contained in a lease."

These citations indicate the most interesting subjects for discussion in connection with options: whether any interest in land is created, and if so its nature and incidents; whether an "option" can be assigned: how far the benefit or burden is transmitted to executors and administrators; how far, where the option is in a lease the covenants run with the land, and kindred and subordinate questions.

These important and interesting questions will be dealt with in the second part of this paper; this first part will review definitions and will direct attention to some of the points in which an option differs from a mere unaccepted offer on the one hand, and from ordinary contracts on the other.

[1] 5 A. L. R. 141.
[2] 20 Ch. D. 562.
[3] [1905] 2 Ch. 257.

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PART I.

(a) *Definitions, &c.*—It is much easier to describe and explain what an option is and what it is not, than to give an exact definition of it. The neatest definition that I have run across is that given by Cameron, J.A., in *Paterson* v. *Houghton*,[4] (approved in *Carey* v. *Roots*,[5]) "An option is defined to be a right acquired by contract to accept or reject a present offer within a limited, or it may be, a reasonable, time in the future."

A contract for the sale and purchase of land, like any other contract, can be reduced to an *offer* on one side, and its *acceptance* on the other. Until accepted the offer can always be revoked. If, however, for valuable consideration moving from the offeree, the offeror agrees to make his offer irrevocable for a given period in the future, we have an "*option*," or better, an "*option-contract*."

The elements of the matter are very simply stated in Anson on Contracts: 'A promise to keep an offer open would need consideration to make it binding and would only become so if the party making the offer were to get some benefit by keeping it open. The offeree in such case is said to "purchase an option"; that is the offeror in consideration usually of a money payment, binds himself not to revoke his offer during a stated period.'

The "option" itself is a contract, viz.: an agreement to keep the offer open for the specified period—and consequently like any other contract requires a *consideration* to support it.

It is solely this quality of irrevocability, founded upon consideration, that distinguishes an option from an ordinary offer. Even the right which the option holder is said to have to "exercise his option," i.e., to elect to accept or decline the offer, is not the distinguishing feature of the option contract; for until a mere offer is revoked, the offeree has got exactly the same right of exercising his option: in like manner he can elect to accept or decline the offer. While this may seem very elementary, in connection with the subjects proposed to be discussed in the second part of this paper, it is of importance to emphasize the point.

It is sometimes said that an option is a unilateral contract. This does not appear strictly correct; each party gains

[4] 19 Man., at p. 175.
[5] 23 W. L. R., at p. 892; 5 A. L. R., at p. 186.

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an advantage, the offeror gets money or its equivalent; the offeree acquires a valuable right.

In a Montana case,[6] it is rather neatly put: "An agreement in writing to give a person the 'option' to purchase lands . . . is simply a contract by which the owner of property agrees with another person that he shall have the right to buy his property at a fixed price within a certain time. He does not sell his land; he does not then agree to sell it; but he does sell something; that is the right or privilege to buy at the election or option of the other party. The second party gets *in praesenti*, not lands, not an agreement that he shall have the lands, but he does get something of value; that is the right to call for and receive the lands if he elects."

(b) *Parties.*—Generally speaking any party who is competent to enter into an ordinary contract may be a party to an option agreement.

An exception, which at first blush seems rather curious, is made in the case of executors, administrators and trustees.

In *Oceanic Steam Nav. Co.* v. *Sutherberry*,[7] Jessel, M.R., (James, L.J., and Lush, L.J., concurring), states:—"but the question is not whether this was a proper rent, but whether it was right to insert an option of purchase so as to fetter the exercise of the trust for sale by preventing the administrator from selling the property to anyone but the plaintiff for a period of seven years at a price then fixed. It appears to me it would be dangerous to hold that an administrator could do this, a mere trustee whose duty is to sell within a reasonable time. In the case of an ordinary trustee it is clear that no such option could be given by him; . . ."

This case was followed in Alberta in *St. Germain* v. *Reneault*.[8]

In this case, the defendant Evelyn Reneault was a widow, the administratrix of the estate of her deceased husband. In her capacity of administratrix she granted a lease of certain premises to one Boudreau for a period of seven years, the lease containing a clause granting an option to the lessee to purchase the property at a fixed price at any time during the currency of the term. The action was brought by one of the

[6] *Ide* v. *Parker*, 24 Am. St. Rep. 17.
[7] 16 Ch. D. 236.
[8] 2 A. L. R. 371.

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next-of-kin against the administratrix and the lessee, the other next-of-kin being added as parties defendant, claiming a declaration that the option to purchase was void as being a breach of trust. In spite of secs. 54, 76 and 135 of the Land Titles Act (which were relied upon by the defendant-lessee) the Court held that the case was governed by the judgment in *The Oceanic Steam Navigation Co.* v. *Sutherberry* above cited. A curious aftermath of this case was the case of *Boudreau* v. *Reneault*,[9] in which the lessee instituted an action against Evelyn Reneault, the widow and administratrix of the deceased, claiming specific performance of the option to the extent of the widow's interest in the estate, namely, one-third, and an abatement to the extent of the other two-thirds. It was held on appeal by the Court *en banc* affirming the judgment of the trial judge—though on different grounds—that the difference between an undivided one-third interest in a general estate of which the property agreed to be sold is only part, and the whole interest in the specific property covered by the agreement is so great that it removes the case altogether from the application of the *cy-pres* doctrine.

Real Estate Brokers, Attorneys, &c.—Where, and under what circumstances a real estate broker employed to sell property has power to enter into a binding agreement of sale on behalf of his client, is a somewhat vexed question; it is submitted, however, that at least the broker cannot grant an option (unless expressly authorized by his client), and that the principle of *Oceanic Steam Nav. Co.* v. *Sutherberry* applies to him [10] as well as to an ordinary attorney with the usual power to manage, lease and sell.

The law in the United States is thus summarised in the editor's note to *Trogdon* v. *Williams* [11]:—

'The general rule that a power to sell real estate must be strictly followed in order to bind a principal, applies when the agent attempts to bind the principal by an option on such real estate, if such right is not expressly given in the power to sell. And the few cases that have passed upon the matter hold, as does *Trogdon* v. *Williams*, that an option under such circumstances is not binding on the principal."

[9] 3 A. L. R. 333.
[10] It is expressly so held in an American case *Tibbs* v. *Zirkle*, 55 W. Va. 49; 104 Am. St. Rep. 977.
[11] (N. Car.) 10 L. R. A (N.S.) 867.

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It is true that in *Matthewson* v. *Burns*,[12] Boyd, C., says: "Next and last as to the power of the agent to enter into a contract giving the option to purchase. He acted under a power of attorney most comprehensive in its terms; power was given to let, set, manage and improve the lands; to sell and absolutely dispose of the lands 'as and when he shall think fit;' he shall execute and do all such things as he shall see fit. . . . *These ample powers per se would cover selling by way of option, during the term, at a fixed price.*"

The proposition italicised (by me) was not necessary to the decision, and should, it is submitted, be regarded as *obiter dictum*. The learned Chancellor points out that "Burns was told of this very arrangement with the plaintiff, and in fact ratified it by his letter of the 11th May, 1910." No reference seems to have been made to the *Oceanic Steam Nav. Co.* v. *Sutherberry* case, or its foundational principle.

(c) *Form and Construction of Option-Contracts.*—In its simplest form an option-contract may be expressed in language such as this: 'I, A. B., in consideration of $100, hereby grant to C. D. an option to purchase within ten days from date my land—Whiteacre (describing) for the sum of $10,000.'

If at any time before the expiration of the limited period, C. D. simply notifies A. B. that he accepts the offer, the option-contract is at an end, and is replaced by a complete and binding agreement of sale.

It is important to observe that under such simple conditions, the agreement constitutes an *open* contract, which is usually more advantageous to the purchaser than even the ordinary form of agreement used by conveyancers. Consequently, when the owner of land, granting an option—in view of its contemplated acceptance—wishes to attach any express conditions or provisoes to the resulting agreement of sale, it is necessary to stipulate accordingly in the option-contract.[13] This can be done by annexing a form of agreement of sale to the option-contract, and providing that it shall govern in case of acceptance—or it can be provided that in case of acceptance the parties should enter into an "*ordinary*" agreement of sale—though it is obviously to the advantage of the vendor to specify the exact terms of the resulting contract.

[12] 12 D. L. R. 236; 4 O. W. N. 1477.
[13] See Dart on V. & P. (7th Ed.) 274.

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If the option-contract contemplates the drawing up of a formal agreement of sale, the rule is that there is no actual contract of sale between the parties until it is drawn up, executed and delivered. But it is important to observe the variations and exceptions to the rule.

In *Winn* v. *Bull*,[14] Jessel, M.R., states the rule:—"Where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and dependent upon a formal contract being prepared."

In *Chinnock* v. *Marchioness of Ely*,[15] Lord Westbury says:—"But if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation."

This is approved in *Rossiter* v. *Miller*,[16] and amplified and explained by Lord Blackburn. He says:—"It is a necessary part of the plaintiff's case to shew that the two parties had come to a final and complete agreement, for if not there was no contract. So long as they are only in negotiation either party may retract. . . . But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared embodying the terms which shall be signed by the parties does not by itself shew that they continue merely in negotiation . . . but as soon as the fact is established of the final mutual assent of the parties so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed."

Again, the parties may act on the terms in the option-agreement as if, after acceptance, it were the complete agreement of sale, so as to effect on both sides a waiver of the term providing for the drawing up and execution of a formal contract. This is very well illustrated by the Manitoba case *Munroe* v. *Heubach*.[17]

Again, the option agreement may be so drawn, that the agreement of sale resulting from acceptance is only to come into effect, upon the investigation and proof of title, inspection of lands, or payment of purchase-money, or all or some

[14] 7 Ch. D. 29.
[15] 4 DeG. J. & S. 638.
[16] 3 App. Cas. 1124.
[17] 18 Man. 450; 8 W. L. R. 785; 10 W. L. R. 196.

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of these conditions. Even the option-contract itself may be so drawn as not to come into effect, except subject to similar conditions precedent, as in *McKinley* v. *Frank*,[18] though that case might have been decided against the plaintiffs on the ground of their cancellation of the option, which the defendant was permitted to plead at the trial by way of amendment to his defence.

As to actual payment of moneys being a condition precedent to establishment of the relationship of vendor and purchaser, even on an executed agreement of sale, see *Knight* v. *Cushing*.[19]

As agreement purporting to be, and even expressly called, an "option," may be found in reality, to be an agreement of sale, when its substance is examined— so as not to exclude it from the operation of the doctrine of relief against forfeiture.

In *Jones* v. *Morris*,[20] the facts of which are too complicated to state at length, Stuart, J., says, after reciting the so-called "option' agreement—"The defendant contended that it was an option, strictly so-called, and that as the plaintiff had not exercised his rights under it by the time limited therein, he had lost them entirely. The plaintiff contended that it was nothing more or less than a substantive agreement for sale. . . . The agreement before me must be interpreted just as any other agreement. It is absurd to ask the Court to say, first, that it is what is called an option, and then use that catch-word as an aid to interpretation. The interpretation of the words and meaning of the agreement must come first. The result of this may be that it is discovered to be an option strictly so-called or it may be that, while it presents many features of such an option, some particular elements are lacking; or that, owing to the presence of some particular elements in the agreement, while it may present many features of an option, yet the strict rules which are generally considered applicable to an option cannot in justice be applied in the case."

The judgment resulted in the "option" being treated as an agreement of sale, and, on the principle of relief against forfeiture, the plaintiff was awarded specific performance, in spite of his default in compliance with the terms set out in

[18] 11 W. L. R. 571; 12 W. L. R. 498.
[19] 46 S. C. R. 555.
[20] 12 W. L. R. 651.

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the agreement, viz.: "The *option* hereby given shall be open for acceptance up to, but not after the 15th July, 1909, and shall be accepted by payment of the said amounts in full on or before 12 o'clock noon on that date. Time shall be of the essence of this agreement."

On the same principle, no doubt, the converse is true, and an instrument drawn in the form, and expressly called, an "agreement of sale," may similarly when its substance is examined, be found in reality to be only an "option."

The following case has been submitted to me for opinion:—

"20th December, 1913.

Agreement of sale between "A." (of so-and-so), Broker, and "B." (of so-and-so), Gentleman, entered into this 20th day of December, 1913, by which "A." agrees to sell to "B." one-half interest in (certain lands) for the following consideration, namely:—

$20,000 to be paid as follows: The sum of $10,000, on or before December, 31st, 1913; the sum of $5,000, on or before June 30th, 1914; the sum of $5,000, on or before December 30th, 1914. On receipt of the final payment, the said "A." will deliver and transfer to "B." a legal transfer and assignment of one-half interest in the above property. *The said "A." further agrees that after the expiration of two years from date, should "B." wish to withdraw his interest from the said property, "A." will return all moneys received from "B." without interest,* providing "B." assigns and delivers to "A." all his interest in the said property."

Under this agreement "B." made the first payment of $10,000—on or before December 31st, 1913. The instalment of $5,000—to be paid on June 30th, 1914, was not paid, nor was the instalment of $5,000—falling due on December 31st, 1914.

In the interval between June 31st, 1914, and December 31st, 1914, "B." began an action to set aside the agreement on the ground of misrepresentation—*innocent* misrepresentation. This action was dismissed.[20a]

The trial judge gave judgment in favour of "A." on his counterclaim for $7,500—the payment that fell due on the 30th June, 1914.

Prior to the judgment being *entered* "A." filed and served a notice of abandonment of his counterclaim, and

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has since notified "B." that unless the two instalments of $5,000 each—which fell due respectively on the 30th June, 1914, and on the 31st December, 1914, are paid within fifteen days, that the "*option*" contained in the agreement of the 20th December, 1913, will be at an end, and finally determined, and that he "A." will retain the $10,000—already paid to his own use.

Suppose at any time after the 20th December, 1915—that is, after the expiration of two years from the date of the agreement "B." brings an action against "A." to recover the $10,000—paid by him, can "A." successfully defend the action on the ground that the agreement in question was, in effect, a *two years' "option,"* and that time was strictly of the essence, and since "B." had not complied with the terms and conditions of the option, and had made default in the payments to be made on the 30th June, 1914, and the 31st December, 1914, he has no further rights under the agreement?

This case will doubtless come before the Alberta Courts for consideration within a short time.

(d) *The "Exercise" of an option, or "Acceptance."*—

(a) Time within which option must be "exercised."

The option-agreement itself nearly always defines the time for, and often the method of "acceptance," or as sometimes expressed "the exercise of the option." Remembering that an option-agreement is simply an offer irrevocable for the limited period, it is obvious that logically the *option* is just as truly "exercised" by non-acceptance as by acceptance of the offer. The usual meaning, however, attached to the expression "exercise the option" in an option-agreement, is equivalent to "accept the offer." Thus in *Lawrence* v. *Pringle,*[21] Macdonald, C.J.A., (B.C.) says: "The agreement is inartistically drawn, and some confusion arises by reason of the phrase "acceptance of the option" being sometimes used and at other times the phrase "exercise of option." It is, however, clear to my mind that "acceptance" of the option means the election of the plaintiffs to buy the property on the terms specified, and that "exercising the option" means the same thing."

[21] 21 W. L. R. 546.

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Where no time for acceptance is defined, it is said that the option is open for, and must be accepted within a reasonable time: *Cunningham* v. *Stockham* [22]; *Carey* v. *Roots*.[23]

This, however, requires analysis: is the limitation of a definite period of time within which the offer is *irrevocable* essential to the definition of "option"? or, on the other hand, may an option be open for an unlimited period?

Both the above cases could have been decided on the ordinary principles of the law of contract, without any special reference to "option" at all. An ordinary offer, until revoked, can always be accepted within a reasonable time, and if so accepted the contract between the offeror and the offeree is complete. "There is, of course, no such thing as a reasonable time in the abstract. It must always depend on circumstances": *Hicks* v. *Raymond*.[24]

In *Cunningham* v. *Stockham (supra)*, the defendant on the 4th September, 1908, offered to sell his timber limits to the plaintiff at $1.50 per acre, and if accepted, $2,000 was apparently to be the "cash payment," the balance in 2, 4, and 6 months. On October 23rd, 1908, the plaintiff, in effect, accepted the offer by tendering the $2,000. The *offer* had not been revoked and it was just a simple question, apart altogether from "option" or no "option," whether the acceptance was in reasonable time.

The trial judge held it was not. He says: "But no time was specified in which that acceptance should be notified, therefore I take it that meant a reasonable time, &c. . . . but I do not think, having regard to the nature of timber dealings, that the 23rd would be a reasonable time." The judgment was affirmed, but Martin, J., dissenting, says: "I think the option was duly accepted, and so far as payment is concerned it became only a question of reasonable time and there could be no cancellation without reasonable notice."

I have not referred to the provision in this case (which would undoubtedly aid the Court in determining reasonable time for acceptance) that the offeree was to have 30 days to cruise the limits, because the point is this—the whole question could be determined on the elementary law of contract. See Anson on Contracts, 13th ed., p. 39. *Ramsgate Hotel Co.* v. *Montefiore*.[25] Note also that in this case the consideration for

[22] 15 B. C. R. 141.
[23] 5 A. L. R. 125.
[24] [1893] A. C. 22.
[25] L. R. 1 Ex. 109.

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the option—one dollar—could hardly be deemed more than merely nominal.

So in the Alberta case—*Carey* v. *Roots (supra)*, when the consideration for the option was $10—the question was really whether the acceptance on January 20th, 1912, of an offer made on November 25th, 1911, and not revoked, was in reasonable time—under all the circumstances of the case. It had really little or nothing to do with the fact that the offer was contained in an option-agreement.

Dart on Vendors & Purchasers, puts the matter in this way: "Where the contract fixes no date for the exercise of the option, the Court will try to discover from the terms of the agreement and the circumstances of the case the intention of the parties. If the option has not been exercised by the date at which the Court is of opinion that it was intended to be exercised, neither party can enforce it (citing *Wentworth* v. *Hull & N. W. J. R. Co.*[26] But the Court cannot import a limit where none can be discovered from the terms of the contract."

This last proposition is not borne out by the authority cited, namely, *London & South Western R. W. Co.* v. *Gomm.*[27] It is expressly pointed out in this judgment that the period for exercising the option was not merely unlimited, but that it was expressly made unlimited to suit the circumstances surrounding the contract.

Perhaps the true meaning to be attached to the statement that, where no time is specified the option is open for acceptance within a reasonable time, is this, that if a man "purchases an option" and no time is limited, the vendor cannot revoke his offer, without reasonable notice to the purchaser; but it is submitted that by notification to the purchaser he could make time strictly of the essence. "Though time may not originally have been of the essence of the contract, either party may, if there has been some default or unreasonable delay by the other party, by proper notice, bind the other party to complete within a reasonable specified period." Dart on V. & P. (7th ed.), 500, 501.

If this be correct, then the distinction between reasonable time for acceptance in the case where a man "purchases an option" and in that where a mere offer is made

[26] (1891) 64 L. T. 190.
[27] 20 Ch. D., at p. 580.

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to him, may be stated to be this: in the case of a mere offer the offeror may revoke it at any time before acceptance; in the case of an option the offeror cannot revoke the unaccepted offer without notice in the meaning of the above quotation from Dart.

This view is strongly supported by the decisions and reasoning in the following cases[28]: *Hersey* v. *Giblett*[29]; *Moss* v. *Barton*[30]; *Buckland* v. *Papillon*.[31]

Where time is specified for acceptance, either by the terms of the option-contract or by subsequent notice, the rule is that it is strictly of the essence: *Dibbins* v. *Dibbins*[32]; *Paterson* v. *Houghton*.[33]

In fact all the conditions imposed in the exercise of the option are strictly construed. Dart (7th ed.), 272, *Archdekin* v. *McDonald*.[34] But there may be circumstances surrounding the transaction that may induce the Court to hold time not to be essential, as pointed out by Stuart, J., in *Jones* v. *Morris*.[35] The vendor may by his conduct have raised an equity against himself which will estop him from asserting that the option has expired: *Bruner* v. *Moore*.[36]

(b) *Method of Acceptance.*

Acceptance of the offer must of course be communicated to the offeror, and must be unequivocal.[37] To bind the vendor to the contract, the acceptance need not be in writing. "An offer containing the names of the parties, and the terms of an offer signed by the offeror will bind him though the contract is concluded by a subsequent parol acceptance:" Anson, p. 84.

Though neither written nor parol notice may be given, acceptance of the option may be implied from the acts and

[28] It will be noted that all the above cases were instances of the option being contained in a lease, and possibly different considerations may apply to what, for convenience, may be called an "option at large" or "*en gros*."
[29] 18 Bea. 174.
[30] 1 Eq. Cas. 474.
[31] L. R. 2 Ch. 67.
[32] [1896] 2 Ch. 348.
[33] (Man.) 11 W. L. R. 118.
[34] (Man.) 20 W. L. R. 595.
[35] (Alta.) 12 W. L. R., at p. 656.
[36] [1904] 1 Ch. 305.
[37] Cf. *Pearson* v. *O'Brien*, 22 W. L. R. 705.

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conduct of the parties—or may be waived: *Allan* v. *Riopel*[38]; *Friary Holroyd* v. *Singleton.*[39]

If the time for exercising the option is extended this constitutes in effect a new contract, and requires a new consideration to support it: *Archdekin* v. *McDonald*[40]; *Paterson* v. *Houghton.*[41] Where a certain number of days are limited for the exercise of the option, this means consecutive periods of 24 hours each running from the hour the option was given, and expiring at the corresponding hour of the last day, and not at mid-night of that day: *Beer* v. *Lea,*[42] following *Cornfoot* v. *Royal Exchange Assurance Corporation.*[43]

In some instances the option is so drawn that payment of the purchase-money, or part of it or performance of other conditions within the limited time, are essential. All such precedent terms and conditions must be strictly complied with: *Brooke* v. *Garrod*[44]; *Lord Ranelagh* v. *Melton*[45]; *Weston* v. *Collins*[46]; *Paterson* v. *Houghton*;[47] Dart (7th ed.), 272.

Such a condition requiring payment of the purchase-money on a named day, must be complied with, even though no title has been shewn to the land. Dart (7th ed.), 273, citing *Brooks* v. *Garrod.*[48]

The decision in the Supreme Court of Canada in *Knight* v. *Cushing,*[49] would have been in line with this, if the receipt for the "deposit" in that case, had been merely an option; instead, unfortunately, it represented "the real and complete agreement between Kenwood on behalf of the defendants and the plaintiff.[50]

But where the time of payment is not obligatory, acceptance alone is sufficient to complete the contract, and payment

[38] (Alta.) 26 W. L. R. 248.
[39] [1899] 2 Ch. 261.
[40] (Man.) 20 W. L. R. 595.
[41] 12 W. L. R. 334.
[42] 7 D. L. R. 436.
[43] [1903] 2 K. B. 363; [1904] 1 K. B. 40.
[44] 2 De G. & J. 67.
[45] 2 Dr. & Sm. 282.
[46] 11 Jur. N. S. 190.
[47] 12 W. L. R. 330.
[48] 2 D. & J. 62.
[49] 46 S. C. R. 555.
[50] Per Beck, J., in Alberta Court *en banc.* See comments on this case in McCaul on Remedies of Vendors & Purchasers, pp. 23 *et seq.*

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may be made afterwards within a reasonable time. *Cf. Mills* v. *Haywood.*[51]

This principle is very well illustrated in *Carey* v. *Roots,*[52] a very instructive case on several of the points under discussion. Harvey, C.J., (at p. 136), says: "As far as the payment of the money on the day named is concerned, the whole question appears to be whether the offer could be accepted or, as it is commonly expressed, the option could be taken up, without the payment of the money. If it could not the payment of the money was a condition precedent and the offer was binding only till the date fixed for the payment and could not be accepted after. If, however, the offer could be effectively accepted without the payment of the money, then upon such acceptance a new contract of purchase and sale would be complete and the rules applicable to such contracts would apply and in the absence of some stipulation or special circumstance time would not be essential. See *Weston* v. *Collins.*[53]"

[51] 6 Ch. D. 196.
[52] 5 A. L. R. 125.
[53] (1865) 34 L. J. Ch. 353, at pp. 354-5; 5 N. R. 345; 11 Jur. (N.S.) 190.

(To be concluded.)

C. C. McCaul.

Edmonton, August 30th, 1915.

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MR. A. V. DICEY ON THE LATEST PHASES OF THE BRITISH CONSTITUTION *ANTE BELLUM*.

The very general anticipation that the novel conditions brought into existence by the present war will result in far-reaching changes in constitutional relations in Great Britain, enhances the interest, which would under any circumstances attach to Mr. A. V. Dicey's review of the aspects which such matters took in 1914. He devotes 89 pages to the subject in the form of an Introduction to the eighth, and what he himself tells us is to be the final edition, of his well-known work on the *Law of the Constitution*. It is the fate of a book which attains to the rank of a classic among text-books, as Mr. Dicey's has, to come to be regarded only as a text-book, and to be neglected by the general reader. This makes it the more incumbent to make its contents known through other channels, when they are of the originality and value of Mr. Dicey's Comments in the present instance.

There is an interesting literary parallel to Mr. Dicey's *Introduction*, in the introduction which Walter Bagehot wrote in 1872 to the second edition of his famour classic on the English Constitution, in which he speaks of the changes which had taken place in the Constitution since the publication of the first edition in 1866, although the period covered the review in Bagehot's case is only six years, whereas Mr. Dicey covers the whole period of thirty years which have elapsed since the first appearance of his great book in 1885. It is of interest, however, to note the matters which presented themselves to Walter Bagehot as calling for comment in 1872 as contrasted with those with which Mr. Dicey finds himself called upon to deal. Would the new voters enfranchised by the Act of 1867 preserve the 'deferential' attitude of their predecessors towards rank and wealth? Would they submit to be guided by their 'betters'? would future statesmen lead the public, as it was their duty to do, or would they let the public lead them? Would both political parties simply bid for the support of the working men; and would the 'lower classes' learn to combine, and so become supreme in the country, producing 'the supremacy of ignorance and numbers over knowledge'? Would such constitutional customs prevail as would make the House of Lords yield to the Commons when the Constitution requires that it should do

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so; or would the House of Lords be swept away together with the system by which estates of great families go to the eldest son? These are the matters which presented themselves to Mr. Bagehot's mind as calling for comment in 1872. Not one of them draws any remarks from Mr. Dicey in 1914, save that he has much that is of interest to say about the relation of the House of Commons to the House of Lords in connection with the Parliament Act 1911.

The matters which the constitutional development of the last thirty years prompts Mr. Dicey to speak of are certain modifications in regard to the sovereignty of the British parliament, a decline among modern Englishmen in their respect, or reverence, for the rule of law, and certain alterations which have taken place in the conventions of the Constitution, and in the relation between some of those conventions and the law of the land. He then discusses what he terms, 'certain new constitutional ideas,' namely, Woman Suffrage, Proportional Representation, Federalism, and the Referendum; and ends with a fine passage on the reassuring character of the attitude of the British nation in the present great crisis.

With regard to the Parliament Act 1911, Mr. Dicey discusses the question whether that Act can properly be said to have transferred legislative authority from the King and the two Houses, to the King and the House of Commons. The Act has of course taken away all legislative power in respect to Money Bills from the House of Lords. That House may discuss such a Bill for one calendar month, but its power ends there. With respect to all other Public Bills, except a Bill extending the maximum duration of Parliament beyond five years, the Act takes away from the House of Lords any *final* veto, but leaves or gives to it a *suspensive* veto. The effect of its provisions is that the House of Lords may insist, in regard to such Bills, upon a delay of at least two years and one calendar month, and a powerful opposition in the House of Commons may lengthen the delay. Nevertheless Mr. Dicey comes to the conclusion that:—

> 'The better opinion on the whole is that Sovereignty still resides in the King and the two Houses of Parliament. The grounds for this opinion are. firstly, that the King and the two Houses acting together can most certainly enact or repeal any law whatever without in any way contravening the Parliament Act; and, secondly,

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that the House of Lords, while it cannot prevent the House of Commons from, in effect, passing under the Parliament Act any change of the Constitution, provided always that the requirements of the Parliament Act are complied with, nevertheless can, as long as that Act remains in force, prohibit the passing of any Act the effectiveness of which depends upon its being passed without delay. Hence, on the whole, the correct legal statement of the actual condition of things is that sovereignty still resides in Parliament, i.e. in the King and the two Houses acting together, but that the Parliament Act has greatly increased the share of sovereignty possessed by the House of Commons and has greatly diminished the share thereof belonging to the House of Lords.'

Mr. Dicey, however, observes that the Parliament Act greatly restrains, if it does not absolutely abolish the use of the royal prerogative to create peers for the purpose of "swamping the House of Lords" in order to force through the House a Bill rejected by the majority of the peers. Any king who should in future be urged by ministers to swamp the House of Lords will be able to answer: "If the people really desire the passing of a Bill rejected by the House of Lords, you can certainly in about two years turn it into an Act of Parliament without the consent of the Lords."

In connection with the Sovereignty of Parliament, Mr. Dicey discusses, also, certain changes which have come about between 1884 and 1914 in the relations between the Parliament of Westminster and the self-governing Dominions; and summarises the conclusions at which he arrives in the following passage:—

'In 1884 it was admitted, as it is to-day, that the self-governing colonies must have rights of self-government. But in 1884 the exercise of self-government on the part of any colony was regarded as subordinate to real control by the English parliament and Crown of colonial legislation which might be opposed to English interests or to English ideals of political prudence. In 1914 the self-government, e.g. of New Zealand, means absolute, unfettered, complete autonomy, without consulting English ideas of expediency or even of moral duty. The one limit to this complete independence in regard to local government is that it is confined to really local matters and does not trench upon loyalty to the Empire. The independence of the Dominions, in short, means nowadays

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as much of independence as is compatible with each Dominion remaining part of the Empire.'

Mr. Dicey is, however, so specially interesting and valuable in what he says about the present and prospective relations between Great Britain and the self-governing Dominions, that I propose to reserve all that portion of his Introduction for a separate and subsequent Article.

The second subject which Mr. Dicey deals with is what he terms 'a singular decline among modern Englishmen in their respect or reverence for the rule of law,' which is manifested by actual legislation, by the existence among some classes of a certain distrust both of the law and of the judges, and by a marked tendency towards the use of lawless methods for the attainment of social or political ends. This is manifested by actual legislation in those recent Acts which have given judicial or quasi-judicial authority to officials who stand more or less in connection with, and therefore may be influenced by, the Government of the day, and hence have in some cases excluded, and in others indirectly diminished the authority of the law Courts. Examples are the powers conferred upon the Education Commissioners by the Education Act 1902, on various officials by the National Insurance Acts 1911 and 1913, and on the Commissioners of Inland Revenue and other officials by the Finance Act 1910; and the powers conferred upon the Speaker by the Parliament Act 1911. Mr. Dicey, however, makes here the striking admission, that—

'It is at least conceivable that modern England would be benefited by the extension of official law. Nor is it quite certain that the ordinary law Courts are in all cases the best body for adjudicating upon the offences or the errors of civil servants. It may require consideration whether some body of men who combined official experience with legal knowledge, and who were entirely independent of the Government of the day might not enforce official law with more effectiveness than any Division of the High Court.'

As to the decline in reverence for law among modern Englishmen, our author says:—

'Within the last thirty years there has grown up in England, and indeed in many other civilized countries, a new doctrine as to lawlessness. This novel phenomenon,

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> which perplexes moralists and statesmen, is that large classes of otherwise respectable persons now hold the belief and act on the conviction that it is not only allowable, but even highly praiseworthy, to break the law of the land if the law breaker is pursuing some end which to him or to her seems to be just and desirable. This view is not confined to any one class. Many of the English clergy (a class of men well entitled to respect) have themselves shown no great hesitation in thwarting and breaking laws which they held to be opposed to the law of the Church.'

Whence arises this zeal for lawlessness? Mr. Dicey considers that it arises partly because in England democratic government has already given votes, if not precisely supreme power, to citizens who, partly because of the fairness and the regularity with which the law has been enforced for generations in Great Britain, hardly perceive the risk and ruin involved in a departure from the rule of law; and partly because democratic sentiment, if not democratic principle, demands that law should on the whole correspond with public opinion, but when lawlessness is based upon a fundamental difference of public opinion, it is impossible that the law upon the matter in controversy can be in reality in accordance with public opinion. Hence 'the honest democrat' is perplexed because he conceives that, at any rate, under a democratic government any law is unjust which is opposed to the real or deliberate conviction of a large number of citizens; while the same feeling is almost certain to beget on the part of persons suffering under what they deem to be an unjust law, the belief, delusive though it often is, that any kind of injustice may under a democratic government be rightly opposed by the use of force. And so Mr. Dicey is led to pronounce the following hard saying:—

> 'The time has come when the fact ought to be generally admitted that the amount of government, that is of coercion, of individuals or classes by the State, which is necessary to the welfare or even to the existence of a civilized community, *cannot permanently exist with the effective belief that deference to public opinion is in all cases the sole or the necessary basis of democracy.*'

The justification of lawlessness is, also, in England at any rate, Mr. Dicey says, suggested if not caused, by the misdevelopment of party government, and 'the rule of a party

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cannot be permanently identified with the authority of the nation or with the dictates of patriotism.' With this aspect of modern England Mr. Dicey has much to say, as we shall presently see.

We may now pass to the subject of changes or modifications in the conventions of the British Constitution which have arisen during the last thirty years, and of the conversion of some of them into law, or their close connection with changes which have taken place in the law. The Parliament Act 1911, affords examples of the latter. It gives a statutable definition of a Money Bill, and also contains a special provision as to the mode of determining whether a Bill is a Money Bill. Moreover as we have already seen it greatly restrains, if it does not absolutely abolish, the use of the royal prerogative to create peers for the purpose of "swamping the House of Lords." Under it, it may probably become the custom that each Parliament shall endure for its full legal duration, i.e., for nearly the whole period of five years. For the majority, until a dissolution occurs, can carry any legislation it desires, and the three successive sessions in which a Bill must be passed in order to become law despite the House of Lords, need not be sessions of one and the same Parliament; while the minority may be induced to acquiesce easily in the duration of a Parliament, which secures to each a comfortable income. The provisions of the Parliament Act 1911, may even enable a majority of the House of Commons to resist or over-rule the will of the electors, or in other words, of the nation.

> 'It is highly probable that the direct appeal from the House of Commons to the electorate by a sudden dissolution may henceforward become in England almost obsolete. Yet this power of a Premier conscious of his own popularity to destroy the House of Commons which put him in office, and to appeal from the House to the nation, has been treated by Bagehot as one of the features in which the constitution of England excels the Constitution of the United States.'

Again the Parliament Act, says Mr. Dicey, deeply affects the position and the character of the Speaker of the House of Commons.

> 'The Parliament Act greatly increases the authority of the Speaker with respect to Bills to be passed under

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> the Act. No Bill can be so passed unless he shall have time after time certified in writing under his hand, and signed by him, that the provisions of the Parliament Act have been strictly followed. This is a matter referred to his own knowledge and conscience. There may clearly arise cases in which a fair difference of opinion may exist on the question whether the Speaker can honestly give the required certificate. It is not certain that a party which has a majority in the House of Commons will henceforth desire to have a Speaker who may share the opinions of such party. . . . The Parliament Act is a menace to the judicial character of the Speaker.'

The general tendency of the new conventions, Mr. Dicey tells us, is to increase the power of any party which possesses a parliamentary majority, i.e., a majority, however got together, of the House of Commons, and, finally, to place the control of legislation, and indeed the whole government of the country, in the hands of the Cabinet which is in England at once the only instrument through which a dominant party can exercise its power, and the only body in the State which can lead and control the parliamentary majority of which the Cabinet is the organ. Everything tends in the same direction. The authority of the individual Member of Parliament has suffered diminution. 'Any observer whose political recollections stretch back to the time of the Crimean War, that is 60 years ago, will remember occasions on which the words of Roebuck, of Roundell Palmer, of Cobden, and above all, at certain crises of Bright, might be, and indeed were, of a weight which no Government, or for that matter, no opposition could treat as a trifle.' Legislation is now the business, one might almost say the *exclusive business* of the Cabinet. Seldom if ever can a private member not supported by a Ministry, carry a Bill through Parliament. The Prime Minister, moreover, can greatly curtail the opportunity of discussing legislation when he deems discussion inopportune.

> 'The spectacle of the House of Commons which neither claims nor practices real freedom of discussion, and has no assured means of obtaining from a Ministry in power answers to questions which vitally concern the interest of the nation, is not precisely from a constitutional point of view, edifying or reassuring.' . . . The reason for alarm is not that the English Executive is too strong, for weak government generally means bad administration, but that an English Executive is, as a

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general rule, becoming more and more the representative of a party rather than the guide of the country. No fair-minded man will, especially at this moment, dispute that the passion for national independence may transform a Government of partisans into a Government bent on securing the honour and the safety of the nation. But this fact, though it is of immense moment, ought not to conceal from us the inherent tendency of the party system to confer upon partisanship authority which ought to be the exclusive property of the nation.'

I hope in another issue, or issues, of the CANADIAN LAW TIMES to acquaint its readers with Mr. Dicey's views on Woman Suffrage, Proportional Representation, Federalism, and the Referendum, especially with his views on the present and prospective relations of Great Britain and the self-governing Dominions. In the meanwhile we cannot close better than with the fine passage with which Mr. Dicey ends his Introduction.

'National danger is a test of national greatness. War has its lessons which may be more impressive than the lessons, valuable as they always are, of peace. The whole of the kingdom, or rather of an Empire, united for once in spirit, has entered with enthusiasm upon an arduous conflict with a nation possessed of the largest and the most highly trained army which the modern world can produce. This is in itself a matter of grave significance. England and the whole British Empire with her have taken up the sword and thereby have risked the loss of wealth, of prosperity, and even of political existence. And England, with the fervent consent of the people of every land subject to the rule of our King, has thus exchanged the prosperity of peace for the dangers and labours of war, not for the sake of acquiring new territory or of gaining additional military glory, for of these things she has enough and more than enough already, but for the sake of enforcing the plainest rules of international justice and the plainest dictates of common humanity. This is a matter of good omen for the happy development of popular government and for the progress, slow though it be, of mankind along the path of true fortitude and of real righteousness. These facts may rekindle among the youth of England as of France the sense that to be young is very heaven; these facts may console old men whom political disillusion and dis-

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appointment which they deem undeserved may have tempted towards despair, and enable them to rejoice with calmness and gravity that they have lived long enough to see the day when the solemn call to the performance of a grave national duty has united every man and every class of our common country in the determination to defy the strength, the delusions, and the arrogance of a militarised nation, and at all costs to secure for the civilised world the triumph of freedom, of humanity and of justice.'

A. H. F. LEFROY.

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DOMINION CHARTERS AND DOMINION OBJECTS.

The Movement for Dominion Charters. Of the ordinary commercial and manufacturing companies having their offices in Toronto eighty or ninety per cent. have up to the present time been operating under provincial charters. Of similar companies centering in Montreal the majority, perhaps eighty or ninety per cent., have operated under Dominion charters. In the light of recent decisions of our appellate Courts it is interesting to speculate upon the reasons for this disparity. Has there been so marked a divergence of opinion between Montreal and Toronto lawyers on the question of the respective jurisdictions of the Dominion and the provinces over companies? If the judgment of the Supreme Court of Canada in *Bonanza Creek Mining Co.* v. *The King*,[1] is sustained by the Privy Council will it mean that the lawyers of Montreal may plume themselves on superior perspicacity in constitutional law? Have Toronto lawyers on the other hand had such implicit faith in the efficacy of provincial charters that they have been able conscientiously to recommend them in preference to Dominion charters and in the face of the contention now sustained in the *Bonanza Creek Case*?

Reason for Practice in Ontario. If this is the correct explanation it is more creditable to the legal profession, not only of Montreal but also of Toronto, than another explanation which candour compels us to consider, namely, that the reason for the legal phenomenon is to be sought, not in any radical difference of opinion on constitutional law, but in circumstances, geographical and otherwise, having no relation to constitutional law. There is no doubt that as a matter of convenience the Montreal lawyer has found it easier to go to Ottawa for a charter than to Quebec. The Toronto lawyer on the other hand has found it easier to send his incorporation papers by a student to the Department in Queen's Park, to get his Letters Patent to order while he waited. Moreover in Ontario the road to provincial incorporation has been made broad and inviting while that to Ottawa was until the last decade comparatively straight and narrow. While the provincial department, with enterprise worthy of a commer-

[1] 50 S. C. R. 534.

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cial undertaking, popularized its wares and adapted itself to the demands of the market, the Department at Ottawa was until quite recently inclined to be more conservative in its attitude and, frequently, it is said, supplied customers with what it was thought they ought to have, instead of what they had asked for. Moreover the way to Ottawa was impeded by the provincial company licensing Act, which, notwithstanding sporadic expressions of doubt as to its validity in relation to Dominion companies, was, until the recent decision in the *John Deere Plow Company Case,* pretty generally accepted at face value, and was unquestionably effective in heading off companies who would otherwise have gone to Ottawa for incorporation,—an effect which one may suspect was not foreign to the intention of the framers of the Act. It is important to remember that the company licensing Act of Quebec made specific exception of Dominion companies so that the same obstacle did not exist to Dominion incorporation in that province. But it cannot be assumed that this circumstance fully accounts for the difference in practice between Montreal and Toronto because a marked difference existed before either province had a licensing Act.

Taking all together, it is not easy to resist the impression that the Toronto lawyer, and the Montreal lawyer also, have been influenced by these superficial circumstances more than by a study of the constitutional situation. Whatever the proximate causes in particular instances, there is no evidence that profound conviction on the constitutional issues constituted any large factor. As a matter of fact the average Canadian lawyer, unlike his brother of the American bar, gives himself very little concern with questions of constitutional law, relegating them rather to the field of academic and theoretical law, or modestly avoiding them as calling for a superior order of legal equipment. It is not difficult to believe therefore that in the matter of company incorporation in Ontario, the tendency, however first brought about, to take out provincial charters, has been followed by one lawyer after another with little more cause than a blind faith that what the majority were doing must be right.

The Change in Practice. But the decision of the Privy Council in the case of the *John Deere Plow Company Case,*[2] and that of the Supreme Court of Canada in the *Bonanza*

[2] *John Deere Plow Co.* v. *Wharton,* [1915] A. C. 330.

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Creek Case have produced a marked change, notwithstanding that the latter case is now on appeal before the Privy Council, and that the whole problem of company jurisdiction is before the same body in the appeal on the Companies Reference. The movement towards Ottawa for charters under the Companies Act of Canada has been so extensive as to necessitate considerable additions to the departmental staff to cope with the increased work. The columns of financial and other papers display notices of the incorporation of Dominion Companies under names both new and old; for a large proportion of the incorporations are by way of substituting Dominion charters for previous provincial charters under the same name.

The "Objects" of the new Companies. An examination of the objects of the companies as set forth in these notices suggests certain observations which are offered with some diffidence in the face of the majority opinion as evidenced by the notices, and might not be made at all were it not for the reflection that the majority, having been in error once, might be so again. And if the views are of any value they ought perhaps to be expressed by some one at this time before the practice beginning as a trail has become a beaten track.

The "objects" of the new companies as they appear in the notices of incorporation shew a direct lineage from Palmer's precedents. One wonders, by the way, what sort of precedents Palmer might have drawn had he been working under a federal constitution with the powers of incorporation divided between a federal authority and local authorities as they are in the British North America Act. Not that these Canadian charters do not ask for enough. If they fail in grasp it is not because of over-modesty in reach. Like the modern departmental store they challenge one to name anything they cannot shew in stock. What is disconcerting is to find amid the wealth of enumerated objects and powers nothing to indicate an effort to bring these objects and powers in line with the recent decisions, or to adapt them in the slightest degree to the constitutional situation as disclosed by those decisions. The objects are just such as an English lawyer might draw without any concern for the questions of jurisdiction which arise in a federal constitution like ours. It would seem as if it were still generally assumed that Dominion and pro-

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vincial incorporation were on a sort of alternative parity,—that when the memorandum of association is drawn it is a matter of choice whether you go to the Dominion or the provincial department for your charter; whereas in reality it depends solely upon the form and content of proposed objects which jurisdiction should, or indeed *can*, incorporate the company.

The two jurisdictions. Under the terms of the British North America Act the provinces have jurisdiction over 'the incorporation of companies with provincial objects.' By implication, or, more correctly speaking, by virtue of the opening provisions of sec. 91, jurisdiction over the incorporation of companies with objects other than "provincial" is vested in the Dominion; the whole question of jurisdiction resolves itself therefore into an inquiry what sort or form of objects will identify a company as "provincial" on the one hand and what is necessary on the other hand to stamp a company as being non-provincial or ultra-provincial.

Limitations of Dominion Jurisdiction. It is safe to assume that if there is a type of company which the provinces cannot incorporate there is also a type which the Dominion cannot incorporate. If the provinces could not incorporate a company "to carry on throughout Canada a wholesale and retail business as exporters and importers of and dealers in lumber," it would seem that the Dominion could not incorporate a company "to carry on the business of a lumber yard and planing mill "in the City of Guelph?" If this is so then it is vitally important to the validity of a Dominion charter that it shall present objects which will identify the company as being of the type within the Dominion incorporating sphere, which is the same as saying that the objects must not come under the category of "provincial objects."

It is difficult to say what would be the effect if the Dominion attempted to incorporate a company with objects that were distinctly "provincial," but it is at least open to argument that the charter would be a complete nullity, in fact it is difficult to see what other effect could logically be assigned. Certainly such a result would be no more startling or inconvenient than that which after some years of practice has been found by the Supreme Court in the *Bonanza Creek Mining Case*. At all events the cautious draftsman

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will not court difficulty where it can be avoided, and if any landmarks are discernible they will serve to some extent for guidance in the absence of a clear path.

What are Dominion Objects? These landmarks are to be sought in a few cases decided by the Privy Council, the latest of which is that of the *John Deere Plow Company* v. *Wharton*. In this case a company had been incorporated under the Dominion Companies Act 'to carry on the business of dealers in agricultural implements, carriages and waggons and machinery and a general agency, commission and mercantile business, and to acquire, buy, sell, mortgage, exchange, improve and dispose of all kinds of real and personal property, rights and patents; the operations of the company to be carried on throughout the Dominion of Canada and elsewhere.' Compared with the notices of which mention has been made above, these objects present at least the one merit of brevity. It required no exhaustive list of powers to enable their lordships to hold, without argument, that the objects of the company were not provincial. It would doubtless be interesting and valuable if there had been some discussion of the precise element which marked the company as being outside the provincial sphere. The "territorial" theory of provincial incorporating jurisdiction may have been implicitly assumed and the company regarded as being ultra-provincial because its operations were to extend to more than one province; but that is not at all clear. On the other hand it may have been because the company was plainly intended to carry on trade of such a general description as to bring it within the 'trade and commerce' item of sec. 91, and there is some support for this view in other expressions in the judgment. All that one can say definitely is that a company with objects such as the appellant in that case is unquestionably ultra-provincial and is a proper subject for Dominion incorporation.

"Main" and "Ancillary" Objects. Though their lordships have left no record of their process of reasoning it is instructive to observe how the Courts generally construe a set of objects in a company's charter. A series of cases in England [3] have established a rule of construction which looks among the objects as set forth in the charter for the "main,"

[3] See *Stephens* v. *Mysore (Kangundy) Mining Co., Ltd.*, [1902] 1 Ch. 745; and cases there referred to.

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object, and then regards the other objects as ancillary to, and attendant upon, that main object. Usually the first paragraph of the objects is considered as embodying the main object and the succeeding paragraphs are considered as expressing incidental and ancillary objects or powers. Thus even the brief objects set forth in the John Deere Company's Charter would probably be paraphrased thus:—"to carry on the business of dealers in agricultural implements, carriages and waggons and machinery and a general agency, commission and mercantile business, and *for that purpose* to acquire buy, sell, mortgage, exchange, improve and dispose of all kinds of real and personal property, rights and patents; the operations of the company to be carried on throughout the Dominion of Canada and elsewhere."

The same rule is expressed in a different way by Mr. Justice Duff in the *Bonanza Creek case* when he says:—"It results, I think, from a series of *dicta* (which, if they have not the force of decisions, are still of such weight that it is my duty to follow them) that the undertaking or business of such a company, and the powers and capacities conferred upon the company must *when considered as an entirety* be so limited that the 'objects' of the company fall within the description 'provincial' in the sense mentioned." The principle may perhaps be expressed by saying that in order to identify a company as "provincial" it is not sufficient to find somewhere amongst its various objects and powers an item that might be described as provincial, but the company's charter undertaking must be regarded as a whole and its character and identity for constitutional purposes, assigned from that broad standpoint; which seems to be another way of saying that it is necessary to find what is the "main" object, or what are the main objects of the company. The same principle would seem to apply when it comes to identifying a company as being non-provincial and being within the Dominion incorporation sphere. It would seem equally necessary to look at the objects in their entirety and not at an incidental phrase or item.

Looking at the notices of incorporation one finds nothing about most of them to stamp the objects as being distinctively non-provincial or as differing essentially from objects regularly assigned to provincially incorporated companies, unless it be the phrase 'the operations of the Company to be carried on throughout the Dominion of Canada and elsewhere.'

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It may be that these words are the vital part of the charter, stamping it with a character unassailably non-provincial. But until this has been definitely decided it is manifestly unsafe to depend absolutely upon it. Recently a notice appeared of the incorporation of a company "to carry on the business of gardeners and florists" and for that purpose 'to take over the business heretofore conducted by . . .' followed by the usual ancillary clauses and the clause "the operations of the company to be carried on throughout the Dominion of Canada and elsewhere." It requires a stretch of imagination to view the business of gardening in its "entirety" as anything but a local thing and it would seem to put a heavy strain on the concluding formula of the objects to bear the onus of giving them their essential character. It has been a contention of the provinces that if the provinces have incorporated companies which properly come within the federal sphere the Dominion has also incorporated companies which should have been incorporated under the provincial authority. It would be rash to assume that there is no force in this contention and it would seem hazardous also to assume that any set of objects, no matter how "local" they would otherwise be, can be transmuted into true non-provincial objects by the mere addition of the departmental formula, "the operations of the company," etc.

Territory not the only Consideration. The Supreme Court of Canada is by no means irrevocably committed by the judgments in the *Bonanza Creek Case* to the "territorial" theory of provincial jurisdiction exclusively. There is nothing in the decision in that case or the majority opinions to preclude the Court from holding that the objects of a company may for purposes of constitutional law be identified by reference to factors other than the territory in which the company is to operate. And there would seem to be nothing to prevent the application of a principle corresponding to that in *Union Colliery Co.* v. *Bryden*,[4] which would look beyond the technical phraseology of the objects and ask the question "What is the character of these objects in their real 'pith and substance'"? At all events ordinary caution as well as a sense of fitness would seem to demand that the objects of a Dominion company should be so stated as to imply, apart from the technical clause as to territory, operations of a broad general scope. Whether the company ulti-

[4] [1899] A. C. 580.

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mately make full use of its powers is a secondary question which in the light of the *Colonial Building Association Case*,[5] is of little practical importance.

The Provincial licensing Laws. But there is another reason for observing closely the form of objects to be assigned to a Dominion company. In the *John Deere Case* the immunity of the company from provincial licensing legislation was based largely, perhaps essentially, upon the paramountcy of the Dominion jurisdiction over trade and commerce. Their lordships expressed the opinion:—"that the power to regulate trade and commerce at all events enables the Parliament of Canada to prescribe to what extent the powers of companies the objects of which extend to the entire Dominion should be exerciseable, and what limitations should be placed on such powers. For if it be established that the Dominion Parliament can create such companies, then it becomes a question of general interest throughout the Dominion in what fashion they should be permitted to trade."

Distinction between Trading Company and Land Company? It is most interesting to lay this opinion alongside the cases of *Colonial Building Association* v. *Atty.-Gen. of Quebec* and *Citizens Insurance Co.* v. *Parsons*. It seems quite clear that in neither of these cases would the above quotation have been pertinent, for the reason that the objects of the companies in these two cases were radically different from those of the John Deere Company. The objects of the Colonial Building Association had to do with dealing in real property; those of the Citizens Insurance Company had to do with making contracts of insurance. The undertaking of the John Deere Plow Company is clearly distinguishable as being a *trading* undertaking and the words above quoted seem to rest firmly upon the distinguishing characteristic. If the main object of the John Deere Plow Company had been to hold land, or to deal in land in different provinces, it is difficult to see what corresponding form of words could have been framed to fit into the judgment. It would seem to be an essential feature of the case, and of the company's rights as supported by it, that the company was engaged in "trade" —that is to say trade in the broad sense in which the term is used in the expression 'trade and commerce.' It would probably not violate the opinion of their lordships in the least

[5] *Colonial Building & Investment Association* v. *Atty.-Gen. of Quebec* (1883), 9 App. Cas. 157.

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to insert, in the extract quoted, the word "trading" before the word "company" in both places where it occurs.[6] Any wider reading of the judgment would seem too inconsistent with *dicta* such as those in the *Parsons Case* which, though *obiter*, have been repeated so frequently that they could not well be entirely disregarded. The *dictum* that a land company incorporated by the Dominion might find itself unable to hold land anywhere because of provincial mortmain laws was indeed considerably discounted in the decision of the same Court a few weeks later in the *Colonial Building Association Case*, where it was clearly indicated that if the point came up for decision in concrete the Court was not to be deemed to be bound by the illustrative reference in the *Parsons Case*. But until a decision in concrete has been given it cannot be assumed that a company authorized by the Dominion to hold and deal in land would have the same immunity from licensing laws as a company of the nature of the John Deere Plow Company. Projecting one's self into the future it is possible to imagine it may be ultimately ruled that where a company necessarily requires, as incidental to the carrying out of objects within the Dominion sphere, to use or hold lands, a provincial legislature could not make such holding or use illegal. The judgment in the *Colonial Building Association Case* clearly leaves the way open for such a ruling, and it would not be necessarily inconsistent with a definite finding, in accordance with the *dictum* in the *Parsons Case*, that a company incorporated by the Dominion for the purpose of holding and dealing in land *as its main object*, was subject to provincial regulation in a way not open to the provinces in the case of a company dealing in merchandise. The subject is no doubt beset with diffi-

[6] In the general *Companies Reference* to which special attention is given in the Lord Chancellor's judgment the questions were: "Is it competent to a provincial legislature to restrict a 'company' incorporated by the Parliament of Canada *for the purpose of trading* throughout the whole Dominion in the exercise of the special trading powers so conferred or to limit the exercise of such powers within the province?

"Is such a *Dominion trading company* subject to or governed by the legislation of a province in which it carries out or proposes to carry out its trading powers limiting the nature or kinds of business which corporations not incorporated by the legislature of the province may carry on, or the powers which they may exercise within the province, of imposing conditions which are to be observed or complied with by such corporation before they can engage in business within the province?

"Can such a company so incorporated by the Parliament of Canada be otherwise restricted in the exercise of its corporate powers or capacity, and how, and in what respect by provincial legislation?"

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culties and it is possible to raise logical anomalies at every turn. But this much seems clear, that a substantial distinction may be drawn between a trading company on the one hand and a land company on the other, and that it is difficult to apply to a land company the principle enunciatel in the John Deere Case.

Manufacturing Company. What about a manufacturing company? Would the *ratio decidendi* of the John Deere Case apply to a company having as its main object 'to manufacture stoves and furnaces?' Or would a company 'to manufacture, buy, sell and deal in stoves, furnaces and heating appliances' be considered a trading company. These questions cannot in the meantime be answered. But one may venture the conjecture that if a Dominion trading company were authorized, as incidental to its trading operations, to engage in manufacturing, such authority would be upheld in the face of adverse provincial legislation. It would be going a step further to assume that a company with manufacturing as its main object, and trading as an incidental object, would be as immune from provincial interference.

Is the distinction suggested too fine? It is no finer than the distinctions already drawn by the Judicial Committee. And it must be remembered that the line must be drawn somewhere. At all events the draftsman of Dominion objects is not compelled to exercise his ingenuity to see how closely he can come to the line without going over it. A company with general power to trade throughout Canada is well within Dominion jurisdiction. Its trading at all events is free from provincial company licensing laws and that is the chief consideration.

Summary. To sum up: The objects of a company to be incorporated under the Companies Act of Canada should where possible be so drawn as to indicate the main object of the company to be to engage in general trade throughout the Dominion. If powers are enumerated in detail they should be so arranged as to set in relief the trading power, or at all events so as to allow no room for a construction which would place in the premier position among the objects any item which might be "provincial" or which could not be depended upon for immunity from provincial company licensing legislature.

F. W. WEGENAST.

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CURRENT COMMENTARY UPON RECENT ENGLISH AND CANADIAN DECISIONS.[1]

Contract — Undisclosed principal — Want of Consideration moving from principal.—Dunlop Pneumatic Tyre Company v. *Selfridge and Company,*[2] is a decision of the House of Lords illustrating in a very clear way the English doctrine of consideration, though Lord Dunedin says (p. 855) that it is "apt to nip any budding affection which one might have had" for that doctrine. Lord Haldane, as is his wont, formulates the general principles governing the case (p. 853):

> "In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quæsitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*. A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it, consideration must have been given by him to the promisor or to some other person at the promisor's request. These two principles are not recognised in the same fashion by the jurisprudence of certain Continental countries or of Scotland, but here they are well established. A third proposition is that a principal not named in the contract may sue upon it if the promisee really contracted as his agent. But again, in order to entitle him so to sue, he must have given consideration either personally or through the promisee, acting as his agent in giving it."

The facts of the case were these. The Dunlop Company entered into a contract with A. J. Dew & Co., that in consideration of discounts and rebates being allowed off the Dunlop Company's current price list, A. J. Dew & Co. would purchase from the Dunlop Company goods to the quantity

[1] The aim of the Editor is to make this feature of the C. L. T. a really complete and conscientious review of recent English decisions likely to be of use to Canadian lawyers, so that readers of it, from month to month, may rely on no important case escaping their notice. Cases under the English Workmen's Compensation Act, 1906, however, are not considered as coming under this category.

[2] [1915] A. C. 847.

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therein mentioned. There were several conditions attached to the contract, among them the following: "A. J. Dew & Co. will, as your agents in this behalf, in the case of any sale of your tyres, covers, or tubes to a trader obtain from such trader a written undertaking that he will similarly observe your list prices, terms, and conditions of sale current at the time of sale in any resales by him." In accordance with this contract A. J. Dew & Co., when selling tyres to Selfridge and Co., made a contract with the latter that they (Selfridge & Co.) would similarly observe the Dunlop company's prices, terms, and conditions of sale current at the time of any sale by them. This, however, Selfridge & Co. did not do. The Dunlop company brought this action against Selfridge & Co. claiming an injunction and damages. The House of Lords held unanimously that, assuming that the Dunlop company were undisclosed principals, no consideration moved from them to Selfridge and Co., and that, therefore, the contract was unenforceable by them. As Haldane, L.C. says (p. 853-4):—

> "The consideration by way of discount under the contract of January 2nd" (*sc.* that between A. J. Dew & Co. and Selfridge & Co.) "was to come wholly out of Messrs. Dew's pocket, and neither directly nor indirectly out of that of the appellants'" (*sc.* the Dunlop Company). . . . "The only consideration disclosed by the contract is one given by Messrs. Dew, not as their agents, but as principals acting on their own account."

What Lord Dunedin says (p. 855) where the words already quoted occur, is:—

> "I confess that this case is to my mind apt to nip any budding affection which one might have had for the doctrine of consideration. For the effect of that doctrine in the present case is to make it possible for a person to snap his fingers at a bargain deliberately made, a bargain not in itself unfair, and which the person seeking to enforce it has a legitimate interest to enforce."

Specific performance—Claim for decree with compensation for collateral misrepresentation.—In *Rutherford* v. *Acton Adams*,[8] the question was whether a purchaser of a large tract of land could, after entering into possession,

[8] [1915] A. C. 866.

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claim compensation for a misrepresentation, outside the contract, as to the mileage of fencing on the land. The contract was silent as to the fencing, but it was contended that the vendor's agent made a material, though innocent, misrepresentation as to the mileage which induced the purchaser to enter into the contract. The purchaser invoked the well-known jurisdiction of a Court of Equity in cases of specific performance to order compensation for discrepancy between what was agreed to be conveyed and what can be conveyed. The Privy Council holds that this does not cover a case of a claim based upon a representation made not in the contract but collaterally to it. Lord Haldane states the law applicable as follows:—

> "In exercising its jurisdiction over specific performance Court of Equity looks at the substance and not merely at the letter of the contract. If a vendor sues and is in a position to convey substantially what the purchaser has contracted to get, the Court will decree specific performance with compensation for any small and immaterial deficiency, provided that the vendor has not, by misrepresentation or otherwise, disentitled himself to his remedy. Another possible case arises where a vendor claims specific performance, and where the Court refuses it, unless the purchaser is willing to consent to a decree on terms that the vendor wil make compensation to the purchaser, who agrees to such a decree on condition that he is compensated. If it is the purchaser who is suing, the Court holds him to have an even larger right. Subject to consideration of hardship he may elect to take all he can get, and to have a proportionate abatement from the purchase-money. But this right applies only to a deficiency in the subject-matter described in the contract. It does not apply to a claim to make good a representation about that subject-matter made not in the contract but collaterally to it. In the latter case the remedy is rescission, or a claim for damages for deceit where there has been fraud, or for breach of a collateral contract if there has been such a contract."

Negligence—Law of Quebec.—Canadian Pacific R. W. Co. v. *Fréchette*,[4] illustrates a very important distinction between the law of Quebec in actions of negligence, and that of Ontario, and, no doubt, all our common law provinces. That

[4] [1915] A. C. 871.

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difference cannot be better stated than in the words of Lord Atkinson at pp. 878-9:—

> "If one takes, such a plea of contributory negligence as might be framed in conformity with the judgment by Wightman, J., in *Tuff* v. *Warman*,[5] to this effect:—"That the plaintiff himself so far contributed to the misfortune by his own negligence that but for such negligence on his part the misfortune would not have happened, and the defendants could not by the exercise of ordinary care and caution upon their part have avoided the consequences of the plaintiff's negligence." Now that plea, if proved, would be a perfectly good defence in England. It would be no defence in Quebec. The jury in Quebec, notwithstanding the proof of it, would be entitled to inflict a kind of penalty upon the plaintiff on account of his own negligence, proportioned, presumably, in their opinion to his culpability, deduct that sum from what they would have awarded to him had he been blameless, and give him a verdict for the balance. That is, in fact, what the jury have done in the present case. But though this difference between the laws of the two countries on this subject does exist, it is equally certain that in Quebec, as in England, a plaintiff suing for damages in respect of an injury sustained by him cannot recover if his own negligence be the sole effective cause of that injury. . . The ground of this distinction between the two cases is this: the latter is not, in the true sense of the term, a case of contributory negligence at all. That term can only be properly applied to a case where both the parties, plaintiff and defendant, are each guilty of negligence so connected with the injury as to be a cause materially contributing to it."

In this case their lordships held that the plaintiff was the unfortunate victim of his own rashness and recklessness, and that consequently he had no legal claim against the Railway Company since it had done him no legal wrong. The judgment contains (at p. 881) a useful passage on the subject of the Privy Council over-ruling findings of the jury, as they did in this case, holding that the answer given by the jury to one of the questions submitted to it was "not such as a jury could, on the evidence, have reasonably found." At the place referred to their lordships say:—

> "Every appellate tribunal, conscious of the great advantage enjoyed by a jury in having seen and heard the

[5] (1858) 5 C. B. (N.S.), at p. 585.

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witnesses, and in having had the whole trial conducted under their observation, must feel reluctant to disturb the decision of such a tribunal. This applies in a special degree to this Board, which has to deal with the administration of justice in distant and dissimilar parts of the Empire, and has always desired to strengthen the well-deserved confidence of the local public in their native tribunals; but if, despite this ever-present desire, the Board, after careful examination of the evidence, comes to the conclusion that the verdict of the jury cannot be sustained, no course is open to it but to set that verdict aside. Any other course would amount to a judicial wrong, the punishment of a litigant for something for which he has not been proved to be answerable.

Libel—Publication—Communication posted in unclosed envelope.—The first case which arrests attention in L. R. K. B. for August is *Huth* v. *Huth*,[6] which is a unanimous decision by the Court of Appeal that the fact that the defendant sent a written communication through the post in an unclosed envelope is not of itself evidence of publication by the defendant, although it was in fact taken out of the envelope and read by a servant in breach of his duty. The grounds on which the judges proceed are well indicated by the following passage from the judgment of Swinfen Eady, L.J. (pp. 44-45):—

"On behalf of the plaintiffs it was urged that a letter enclosed in an unclosed wrapper or envelope must be treated as being on the same footing as a post-card, or telegram. I am quite unable to accede to that view. With regard to a post-card and a telegram, it was said by A. L. Smith, M.R., in *Sadgrove* v. *Hole*,[7] that "It is certainly my opinion that if a man writes a libel on the back of a post-card and then sends it through the post there is evidence of publication, as in the case of a telegram. The cases cited shew that the two stand on the same footing;" but that is wholly different from a case where a communication is enclosed in a cover, and is not, without some unauthorized act, withdrawn from the cover and perused. If the plaintiffs had been able to establish that the perusal of this communication was in the ordinary course by a person in the discharge of his duty, the case would have been different, as, for instance, if they were able to shew that it was withdrawn and per-

[6] [1915] 3 K. B. 32; 84 L. J. K. B. 1307.
[7] [1901] 2 K. B. 1, at p. 4; 70 L. J. K. B. 455, at p. 457.

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used by a Post Office official. . . . Although persons in the employ of the Postmaster-General in the discharge of their duty may have to peruse and examine postal communications, and although a publication of a libel in that way would be established if perusal took place, there is no inference of fact or law to be drawn that, in all cases, communications of this sort are opened and read by the Post Office officials.

Bray, J. (at pp. 45-6) says:—

"The writing was placed in an envelope which was not closed or sealed, it was posted, and arrived in the ordinary course of post at the house where Mrs. Huth resided and was opened and read by the butler, and the first contention of the plaintiffs was that that constituted a publication by the defendant. It was a publication, but the question is whether it was a publication by the defendant, or one for which he was responsible. . . There can be no doubt that the opening of the envelope and the reading of its contents was a wrongful act by the butler. In my opinion it is quite clear that in the absence of some special circumstances, a defendant cannot be responsible for a publication which was the wrongful act of a third person.

Charter Party—Constitution—Penalty Clause or Limitation of Liability.—In *Wall* v. *Rederiaktiebolaget Luggude*,[s] Bailhache, J., had to decide whether a clause in a charter party reading: 'Penalty for non-performance of this agreement proved damages, not exceeding estimated amount of freight'—was to be construed as a penalty, or as a limitation of liability. He held that it was a penalty clause, the parties by inserting the words 'proved damages' having merely expressed in words the true legal effect of such a penalty clause, instead of leaving the legal effect to be supplied by the parties themselves in view of the statute 8-9 Wm. III. ch. 11, the effect of which is that where the plaintiff sues for the penalty in a bond, he shall be able to recover proved damages up to, but never more than, the penal sum fixed. Consequently he held that the clause being a penalty, and not a limitation of liability, did not prevent the plaintiff upon non-performance of the contract, recovering the actual damages though exceeding the estimated amount of freight,

[s] [1915] 3 K. B. 66.

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upon the principle laid down by Lord Ellenborough in *Harrison* v. *Wright*,[9] and followed in several other reported cases, that

> "The penalty is auxiliary to the enforcing performance of the contract; and the party grieved may either take the penalty as his debt at law and assign his breach under the statute of William; or he may bring his action for damages upon the breach of contract."

Arbitration clause in contract — Staying proceedings.— *Monro* v. *Bognor Urban District Council*,[10] was a case before the Court of Appeal upon the constitution of the arbitration clause in a certain contract. Pickford, L.J., says (p. 172), that he does not know that any of the authorities are exactly on all fours with this case, which was as follows: A contract was entered into between the plaintiff and the defendants for the construction of sewerage works which contained an arbitration clause in these terms—'If at any time any question, dispute or difference shall arise between the council or their engineer and the contractor upon or in relation to or in connection with the contract the matter shall be referred to and determined by the engineer. . . .' The plaintiff, the contractor, was of opinion that he had been misled by fraudulent statements made in the specification that a borehole had been taken upon the site on which he was to build, and as to the character of the subsoil. He, therefore, brought this action for damages, and an injunction to restrain the defendants in any way using his plant and materials then on the defendant's premises. The defendants moved to stay the proceedings, and refer the dispute to arbitration on the ground that it was 'upon or in relation to or in connection with the contract' within the meaning of the above clause. The Court refused the application upon grounds clearly stated in the following passage from the judgment of Pickford, L.J. (at pp. 170-1):—

> "This action is not, in my opinion, an action upon the contract in any sense of the word. It is an action for damages for fraudulent misrepresentation which induced the plaintiff to enter into the contract and it is also an action for an injunction . . . and then, not expressed in the alternative but being really in the alternative, there

[9] 13 East. 343.
[10] [1915] 3 K. B. 167.

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is a claim for work and labour done upon a *quantum meruit* which he could not maintain if his contract were in existence, because he could then only sue for any instalments that might be due according to the terms of the contract. It is, therefore, in no sense an action on the contract at all. Nor do I think that it is an action in relation to, or in connection with, the contract. In one sense it is an action in relation to, and in connection with, the contract because if there had never been any contract there would never have been any cause of action, there would never have been any representation, and there would never have been any claim for damages. But it is not in relation to or in connection with the contract, in my opinion, within the meaning of the arbitration clause. That being so, I think the action is with reference to matter wholly outside the powers of the arbitrator, and with which he could not possibly deal."

Costs—Shorthand notes—Costs in the cause.—Seal v. *Turner*,[11] is a decision of the Court of Appeal upon a question of taxation, which it is important to notice, though sufficient to state what was decided in the words of the headnote. In an action to recover money subscribed for preference shares, and which the plaintiff alleged had been obtained from him by fraudulent misrepresentation, the trial lasted eight days and resulted in judgment for the defendant with costs. On taxation the Master allowed the costs of taking and transcribing a shorthand note of the proceedings and of transcripts for the judge and counsel for the defendant. The plaintiff objected to this, and insisted that there was nothing to make these costs costs in the cause. It appeared that at the commencement of the trial both parties came to an agreement that a note should be taken and a transcript provided for the judge. The Court of Appeal now held that there was an implied agreement that the costs of taking the note, transcribing it, and making a copy for the judge should be borne equally by the parties (nothing having been said about making these costs costs in the cause), and that the plaintiff was liable to pay half these costs; but that, in the absence of a direction by the judge at the trial, or an agreement by the parties, that the costs of the shorthand notes should be costs in the cause, such costs ought not to be allowed on taxation as part of the costs of the cause; and

[11] [1915] 3 K. B. 194.

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that, except to the extent above stated, no such agreement could be implied in the present case.

Intestacy—Murder of intestate by son—Right to share in estate.—In re Houghton, Houghton v. *Houghton*,[12] was a proceeding to determine the right of John Frederick Houghton to share in the estate of William Houghton, his father, whom it was alleged he had murdered. A coroner's inquest had found that he murdered both his father and his brother, and he had been indicted for the murder of the latter, and convicted, but found to be insane when he committed the act, and ordered to be detained as a criminal lunatic; whereupon an indictment for the murder of the father was not proceeded with. Joyce, J., held that he was not prevented from taking a share under his father's intestacy. The learned judge says:—

> "Since the abolition of forfeiture for felony—before which so far as I am aware, no such question as I have now to consider had ever arisen—it has been settled that, where a person is criminally responsible for the death, the felonious slaying of another, whether the crime be murder or manslaughter, he cannot take anything under the will of the deceased. Hitherto it has never been suggested that there is any such incapacity or disqualification where the person guilty of the act of slaying the deceased was innocent of any crime, as where the deceased was killed accidentally or by misadventure, or his death was held to be a case of justifiable homicide. . . . It is not a necessary condition to the application of the disqualifying rule that there should be any conviction. Not infrequently a murderer commits suicide immediately afterwards, or he may die a natural death before trial on verdict. It has not been determined, or, so far as I am aware, judicially considered, in this country whether a murderer can take a distributive share under the intestacy of his victim. In America I believe there are conflicting decisions upon the point. . . . In the present case, the unfortunate victim, the father, died intestate. But one thing is, I think, quite certain, namely, that, if the indictment against the defendant for the murder of his father had been proceeded with, . . . if he had been found guilty of the act, he would not have been found guilty of any offence; . . . the defendant, if actually tried, would have been acquitted of any criminal

[12] [1915] 2 Ch. 173.

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offence, even if found guilty of the act of killing his father. Consequently I can see no reason why he should not have taken any benefit under the will of his father if the deceased had left a will. There is still less reason, if possible, why he should not take his proper share under the intestacy of his father, the distribution of whose property is regulated by the positive provisions of the statute law."

Will—Legacy 'free of all duty.'—In re Snape, Elam v. *Phillips,*[13] is a decision of Eve, J., which requires a brief notice, in these days of constantly increasing taxation, of which the end is not yet. The learned judge, having held as the question of construction of a gift of a legacy 'free of all duty,' that such duties were payable out of the general estate, also held that the operation of the gift must be determined with reference to the duties imposed in respect of the legacy, *at the date of the death of the testatrix,* and ought not to be extended to duties imposed by the legislature subsequent to that date.

Company—Articles of Association—Alteration of in breach of contract—Contractual right to appoint two directors of a company—Specific performance.—British Murac Syndicate, Limited v. *Alperton Rubber Co. Limited,*[14] is an unusual case, of interest in those of our provinces which incorporate companies by way of memorandum and articles of association, to wit, Nova Scotia, British Columbia, Saskatchewan, Alberta, and the Yukon. In the first place Sarjant, J., decides in it, following *Allen* v. *Gold Reefs of West Africa,*[15] that where a contract into which a company has entered involves as one of its terms that one of its Articles of Association is not to be altered, then the company is not at liberty to alter that Article so as to break that contract; secondly, that a contract with a company under which a certain syndicate was to have the right of appointing two directors was one which the Court could specifically enforce by injunction, notwithstanding the contention that the right of apointing two directors was in the nature of a contract of service, and accordingly one which, on the ordinary doctrine relating to that class of contracts, the Court will not speci-

[13] [1915] 2 Ch. 179.
[14] [1915] 2 Ch. 186.
[15] [1900] 1 Ch. 656.

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fically enforce so as to compel one person to accept another as his servant; and, thirdly, that by virtue of the said contract and of an Article which, pursuant thereto, provided that—'The British Murac Syndicate, Limited, so long as it holds at least 5,000 shares in the capital of the company shall have the right of nominating two directors on the board of the company'—when the syndicate formally nominated the persons whom it selected, those persons became directors then and there; nothing further had to be done to complete their appointment as directors beyond the mere nomination by the plaintiff syndicate. It was in vain suggested that some form of co-option on the part of the other directors was necessary. As to the second point, Sarjant, J., says (pp. 195-6):—

> "I feel great doubt whether the relation between a company and a director is in the nature of a contract of service within the meaning of that doctrine. It appears quite clearly from *Automatic Self-Cleaning Filter Co.* v. *Cunningham*,[16] that directors may have rights and powers and duties under the constitution of the company independently of the direction of a majority of the shareholders, that is to say, that to some extent at least they may occupy an independent position. . . . A managing director is to some extent in a different position from that of an ordinary director because he is half director and half manager. And further the question which I am considering at the moment is not the question whether a particular man shall be forced upon an unwilling company, but whether there is a general right on the part of the plaintiff syndicate to nominate persons who shall be directors of the defendant company. That which the defendant company is trying to do is to get rid altogether of a general right of nomination and not merely to object to receive in the capacity of director a particular individual. . . . I am not going to be the first to hold that an agreement for good consideration, under which a shareholder in a company, while he continues to hold his shares or a certain number of them, shall in virtue of that holding have the right of appointing or nominating a director of the company, is one that cannot be enforced by the injunction of this Court. In my opinion the right is one which ought to be so enforced, and the enforcement of which by way of declaration or injunction is not in

[16] [1906] 2 Ch. 34.

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conflict with the ordinary rules against the specific performance of contracts relating to service. It is not as if the plaintiff syndicate had a power of nominating an absolute majority of the board of directors. To a contract of that kind there might possibly be objections inasmuch as it would be putting the control of the company in the power of an outsider, but that is not the case with which I have to deal."

At the same time he adds (p. 196):—

"I think it is clear that, although an outside body like the plaintiff syndicate in the present case may have the power of nominating two directors on the board, the Court would not by injunction force the company to accept on its board persons who were unfit or thoroughly unacceptable as members of the board of directors."

Therefore although he made a declaration as claimed, that under and by virtue of the nomination, the two persons nominated by the Syndicate became and were directors of the defendant company, he did not grant an immediate injunction in support of it, but said he would wait and see whether the shareholders of the company, who up to the present had only been trying to get rid of the general obligation towards the plaintiff syndicate, thought it worth while to have a meeting called and to object on personal grounds to the appointment of the nominees. He therefore gave liberty to apply for an injunction generally without embodying in that liberty any special directions or indications.

CANADIAN CASES.[17]

Waters—Obstruction placed in waters of navigable lake by lessee of water lots. In Halsbury's *Laws of England* (Vol. 28, p. 395, par. 752) the law is laid down as follows:—

'Interference with the private right of access' (*sc.* to a riparian owner's property) 'is actionable without proof of special damage; but if the interference complained of is an interference with the right of navigation, which thereby affects the right of access, then special damage must be proved, for interference with the right of navi-

[17] As most of our subscribers have ready access to the Canadian Reports, it is not deemed necessary to review the current Canadian cases in the same detail as the English. Only those which seem of special interest and importance will therefore be referred to.—Ed. C. L. T.

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> gation which only renders access more difficult, but not impossible, is an interference with a public and not a private right, and special damage must be proved by the riparian owner who complains of such interference.'

The decision of the Appellate Division in *Baldwin* v. *Chaplin*,[18] illustrates this. The action was brought for an injunction restraining the defendants from invading the plaintiff's riparian rights in respect of land bordering on Lake Erie, and for a mandatory order to compel the removal of a pier placed by the defendants at a distance of 250 feet from the shore line in the lake opposite the plaintiffs' land. The Appellate Division held, upon the evidence, that what the plaintiffs were asserting as a private riparian right of access was in reality a public right of navigation. For the right to land on the plaintiffs present beach was not in question, inasmuch as the present beach was not used; and if it were, an obstruction 250 feet out in the water would form no barrier to landing on the strand or any part of it. They held further that the plaintiffs had shewn no special damages, because such special damage must be a present one to the present existing use of the shore, whereas what the plaintiffs were really setting up was that *if and when* a dock were built at a suitable place on the plaintiff's lot, and *if and when* in the operations of a fishery, it became necessary to get in to this dock with their present fishing outfit of vessels, access would be rendered difficult. No doubt, on the authorities "the present and practical deprivation of access" by distant obstructions might give a right of action, but here this element did not exist.

Hodgins, J.A., who delivered the judgment of the Court, says (at p. 18):—

> "It is not, therefore, the prospective use that gives the right to claim damages or an injunction. It is the present use that must determine whether injury is suffered, although slight, or will necessarily or inevitably follow from the present obstruction, having regard to existing conditions. If a new use springs up, then a new right arises. That which produced no harm when access was not required may be detrimental when the property is put to a different use. This case is not one in which compensation is being fixed for all time, but only one of

[18] 34 O. L. R. 1.

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actual damage by what is now done. It is naturally impossible to estimate present damage to things not *in esse* and to a use only in contemplation and dependent on the method of carrying out future plans, and equally so to grant an injunction based upon the position and use of an imaginary wharf."

Deed absolute in form but executed as security only—Purchaser for value.—In *Molony* v. *Kernan*,[19] Lord St. Leonards laid down clearly that actual payment of the price is necessary to establish a purchase for value. The recent case of *Hetherington* v. *Sinclair*,[20] before Middleton, J., illustrates and applies this doctrine. Perkins and Toll jointly purchased *bona fide* from Sinclair some land, of which Sinclair had the paper title, for $10 per acre, paying $100 down and agreeing to pay $100 a year with interest until the price was fully paid. They did not register the agreement. While it was still executory, the plaintiff, the present owner of the land by descent from the grantors to Sinclair, brought this action claiming that the conveyance to Sinclair was in reality a trust deed held by him as security for payment of money due by the grantors, as the Court held the fact to be; and that, as it contained no power of sale, Sinclair had no right to make the sale to Perkins and Toll without her concurrence. Middleton, J. upheld the plaintiff's contentions, and held her entitled to redeem upon payment of the amount due to Sinclair; the purchasers, Perkins and Toll, to be refunded the money paid by them to Sinclair, and an account to be taken.

Statute of Frauds—Receipt and Acceptance—Subsequent rejection.—Thames Canning Co. v. *Eckardt*,[21] is a decision of Middleton, J., applying and illustrating the rule that to constitute a receipt and acceptance of goods sufficient to take a case out of the Statute of Frauds, all that is necessary is that there should be such a dealing with the goods sold as to recognise the existence of the contract. A receiving into the purchaser's warehouse and an examination to ascertain if the goods are in accordance with the contract is enough, even though the goods are immediately rejected as not being in accordance with its terms. For, although the buyer's opportunity of inspection *primâ facie* arises at the place of delivery, the contract may expressly, or by implication (as

[19] (1842) 2 Dr. & War. 31.
[20] 34 O. L. R. 61.
[21] 34 O. L. R. 72.

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in this case) permit the inspection to be delayed until the goods have reached the purchaser's warehouse.

Constitutional law—Ontario Marriage Act.—Peppiatt v. *Peppiatt*,[22] is a report of the judgment or opinion of Meredith, C.J.C.P., in respect to the unconstitutionality of the provision of the Ontario Marriage Act empowering the Supreme Court under certain circumstances to declare that a valid marriage has not been entered into, to which we called attention, and discussed at some length in our number for June last (p. 503.)

Company — Subscription for Shares — Non-delivery of prospectus—Morrisburg and Ottawa Electric R. W. Co. v. *O'Connor*,[23] being apparently the first reported decision on the construction of one of the sections of our Ontario Companies Act (also found in the Alberta Companies Act) calls for notice. The actual section which it had reference to, was sec. 3 (3) of 6 Edw. VII. ch. 27 (O)—'no subscription for stock . . . induced or obtained by verbal representation, shall be binding upon the subscriber, unless prior to his so subscribing he shall receive a copy of the prospectus.' That section is no longer to be found in our Companies Act, but the judgment of the Court will, obviously, be equally applicable to the enactment which has superseded it, now R. S. O. 1914, ch. 178, sec. 101 (3), [*cf.* Alberta Companies Ordinance, sec. 57 (3)], viz.—'A subscription for shares . . . shall not be binding on the subscriber unless at or before the subscription there is delivered to him a copy of the prospectus, if any, issued by the company, or if the prospectus has not been issued a copy of the statement' (*sc.* issued in lieu of a prospectus). The decision of a majority of the Appellate Division (Hodgins, J.A., *diss.*) is that this enactment has no greater effect than to make the subscriber's contract voidable, if the prospectus or statement has not been served. The subscriber may elect to affirm, as here by allowing his name to be on the list of shareholders for two years and more, without objection. Hodgins, J.A., on the contrary holds that the effect of the section is to wipe out the subscription, and make it legally non-existent; and that, in this case, no act appeared to have been done by the subscriber from which his subsequent assent to becoming a shareholder could be inferred.

[22] 34 O. L. R. 121.
[23] 34 O. L. R. 161.

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Nuisance—Trespass on neighbour's land in order to abate. —All decisions which illustrate the few cases in which the law still permits self-help have for that very reason an interest of their own. *Suttles* v. *Cantin,*[24] is such a case. In order to abate a nuisance by which a stream of water flowing off the plaintiff's land, caused "railings" to be distributed over part of the defendant's mining claim, covering up virgin ground which had not been mined, the defendant peaceably entered upon the mining claim of the plaintiff, which the plaintiff was not operating, and opened a water gate in the plaintiff's dam, so diverting the flow of water and abating the nuisance, doing no more than was necessary and proper for that purpose. The majority of the British Columbia Court of Appeal have affirmed the trial judge in holding that the plaintiff was justified in acting as he did; and that the nuisance being one of commission, even if there had been no emergency, the defendant was not bound to give notice of his intention to abate it. Martin, J.A., (p. 107) cites the case of *Raikes* v. *Townsend,*[25] which decides, as stated in its headnote, that—'If a man in his own soil erect a thing which is a nuisance to another, as by stopping a rivulet, and so diminishing the water used by him for his cattle; the party injured may enter on the soil of the other and abate the nuisance, and justify the trespass; and this right of abatement is not confined merely to nuisances to a house, to a mill, or to land.'

Lease — Notice of forfeiture — Verbal inaccuracy.—Big Valley Collieries Ltd. v. *McKinnon,*[26] is a decision which shews that even in these easy-going days in law, the ancient maxim *qui cadit in syllaba, cadit in tota causa* has some faint application still. It is a decision of Hyndman, J., of Alberta, supported by a couple of recent English judgments, that a very little inaccuracy in a notice that is to be made a basis of a forfeiture under a proviso or stipulation in a lease, such as erroneously stating the date of the lease, is sufficient to invalidate the notice. The date of the lease was stated as January 16th, 1915, whereas it should have been January 8th, 1915. There were one or two other small verbal inaccuracies in the notice.

[24] 32 W. L. R. 101.
[25] (1804) 2 Sm. 9.
[26] 32 W. L. R. 158.

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Voluntary payment of debt of another.—Levinson v. *Gault and Mackey* (No. 1),[27] is a decision of Middleton, J., which is worth a word of notice because it illustrates the characteristically English rule of our law that the voluntary payment by one of the debt of another, without his request, gives no claim for money paid against the person whose debt is discharged. Our law knows nothing of the Roman and civil law principle of *negotiorum gestio*—where by service rendered to another without his consent, you can place him under an obligation *quasi-ex-contractu* to indemnify you—except in the case of military and civil salvage, and the anomalous case of services rendered to a drunken man. 'Mind your own business' seems to be the general English principle.

Railway Crossing—Negligence of Watchman—Liability.—Re Royce Avenue crossing (Toronto),[28] is a decision of the Board of Dominion Railway Commissioners upon a point which apparently had not come up before them on any previous application. The question was—Where does legal responsibility lie where gates are, by order of the Board, erected at a railway crossing over the tracks of two railway companies, and a watchman provided, all at the cost, divided in certain proportions, of the municipality and the two companies, and an accident happens through the negligence of the watchman? The decision is that the watchman should be regarded as the agent of the company whose trains or engines do the damage, although he may have been appointed in fact by the other company; and that the municipality was not responsible for the damage caused. The Chief Commissioner says:—"It is the railway peril that the watchmen are employed to avert. His work is of necessity linked up with the operation of trains and engines, over which the municipality has no control, and the scope of his duty can be much more properly looked upon as an added railway responsibility to the cost of which the interested municipality has to contribute, but is not responsible for its observance. . . . As to the two railway companies . . . each railway company has to advise the watchmen as to the movement of its trains, and the question of the negligence of watchmen is more or less bound up with the possibility of negligence of other servants of the operating railway in the manner in which the trains are operating over the crossing."

A. H. F. L.

[27] 9 O. W. N. 14.
[28] 32 W. L. R. 227.

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SOME RECENT SUPREME COURT CASES.

SUPREME COURT OF CANADA.

ONT.] [JUNE 24TH, 1915.

COFFIN v. GILLIES.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Present: SIR CHARLES FITZPATRICK, C.J., and DAVIES, IDINGTON, DUFF and ANGLIN, JJ.

Contract—Construction—Sale of foxes—Mixed breeds.

By contract in writing G. agreed to sell to C., who agreed to buy, two black foxes "to be the offspring of certain foxes purchased by the vendor from Charles Dalton and W. R. Oulton in the year 1911."

Held (DAVIES and DUFF, JJ., dissenting), that the proper construction of the contract was that the two foxes to be sold must have both Dalton and Oulton parentage and G. could not be compelled to deliver a pair bred from the Dalton strain only.

Appeal dismissed with costs.

D. C. Ross, for the appellant.

W. M. Douglas, K.C., and *J. E. Thompson*, for the respondent.

SUPREME COURT OF CANADA.

ONT.] [JUNE 24TH, 1915.

TORONTO POWER CO. v. RAYNER.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Present: SIR CHARLES FITZPATRICK, C.J., and DAVIES, IDINGTON, DUFF and ANGLIN, JJ.

Negligence — Power company — Accident to employee — Injury from supposed dead wire—Duty of employer—Proper system.

A power company is not liable for injury to an employee from contact with an electric wire represented to be harmless but

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which had, in some way, become charged, when it is shewn that every reasonable precaution has been taken for the safety of employees and there is nothing which proves or from which it can be inferred that the accident was due to the negligence of some person for which the company was responsible.

Per IDINGTON, J. (dissenting).—The only reasonable inference from the evidence is that the accident was caused by negligence; therefore, as decided by *McArthur* v. *Dominion Cartridge Co.*[1] and *Toronto Railway Co.* v. *Fleming*,[2] it is not necessary to determine precisely how such negligence produced the injury complained of. There was also some evidence of a want of proper system and failure to employ competent persons to superintend the work.

Judgment of the Appellate Division (32 Ont. L. R. 612), reversed, FITZPATRICK, C.J., and IDINGTON, J., dissenting.

Appeal allowed with costs.

D. L. McCarthy, K.C., for the appellants.

J. H. Campbell, for the respondent.

SUPREME COURT OF CANADA.

ONT.] [JUNE 24TH, 1915.

HAMILTON STREET RAILWAY CO. v. WEIR ET AL.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Present: SIR CHARLES FITZPATRICK, C.J., and DAVIES, IDINGTON, DUFF and ANGLIN, JJ.

Negligence — Obstruction of highway — Street railway—Trolley poles between tracks—Statutory authority — Protection by light.

The Act incorporating the Hamilton Street Railway Co. authorized the city council to enter into an arrangement with the company for the construction and location of the railway. A by-law passed by the Council directed that the poles for holding wires should, on part of a certain street, be placed between the tracks, which was done under the supervision of the city engineer.

Held, reversing the judgment appealed against,[1] that the location of the poles was authorized by the legislature and did not

[1] [1905] A. C. 72.
[2] 47 S. C. R. 612.
[1] 32 O. L. R. 578.

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constitute an obstruction of the highway amounting to a nuisance; the company was therefore not liable for injury resulting from an automobile, while driven at night, coming in contact with the pole.

Held, also, that as on the city council was cast the duty of regulating the operation of the railway in respect to traffic and travelling on the street, and it had made no regulation as to lighting the pole, the company was under no obligation to do so.

Appeal allowed with costs.

D. L. McCarthy, K.C., and *A. H. Gibson*, for the appellants.
Howitt, for the respondents.

SUPREME COURT OF CANADA.

QUE.] [JUNE 24TH, 1915.

GUARDIAN ASSURANCE CO. v. TOWN OF CHICOUTIMI.

Present: SIR CHARLES FITZPATRICK, C.J., and IDINGTON, DUFF, ANGLIN and BRODEUR, JJ.

Fire insurance—General conflagration—Acts of municipal officials—Demolition of buildings—Statutory authority—R. S. Q. 1888, art. 4426—Indemnity—Subrogation—Tort—Transfer of rights to municipality—Liability of insurer.

Article 4426, R. S. Q. 1888, empowers town corporations, subject to indemnity to the owners, to cause the demolition of buildings in order to arrest the progress of fires; in the absence of a by-law to such effect power is given to the mayor to order the necessary demolition. In the Town of Chicoutimi, no such by-law having been enacted, the mayor gave orders for the demolition of a building for the purpose of arresting the progress of a general conflagration and, in carrying out his directions, an adjacent building was destroyed which was insured by respondents for $4,700. The municipality settled with the owner by paying her $5,500 as full indemnity for all damages sustained, and obtained a transfer of her rights under her policy of insurance with the respondents. In an action on the policy so transferred:—

Held (DUFF, J., dissenting), that, as the destruction of the building insured was occasioned by an act justified by statutory authority and full indemnity had been paid, the municipality was entitled to subrogation to the rights of the owner and to maintain the action against the insurance company for reimbursement to the extent of the amount of the insurance upon the property.

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Per DUFF, J., dissenting.—Although the destruction of the building insured was occasioned by an act justified at common law, the rights of the municipal corporation were determined by the principle laid down in *The City of Quebec* v. *Mahoney*,[3] and the claim for reimbursement to the extent of the amount for which the property was insured could not be maintained. *Quebec Fire Insurance Co.* v. *St. Louis*,[4] applied.

Appeal dismissed with costs.

Atwater, K.C., for the appellants.

Belcourt, K.C., for the respondent.

SUPREME COURT OF CANADA.

EXCH.] [JUNE 24TH, 1915.

TURGEON v. THE KING.

Present: SIR CHARLES FITZPATRICK, C.J., and IDINGTON DUFF, ANGLIN and BRODEUR, JJ.

Government railway regulations—Operation of trains—Negligent signaling—Fault of fellow servant—Common fault—Boarding moving train—Disobedience of employee—Voluntary exposure to danger—Cause of injury.

By a regulation of the Intercolonial Railway, no person is allowed to get aboard cars while trains are in motion. Without ascertaining that all his train-crew were aboard, the conductor signalled the engineman to start his train from a station where it had stopped to discharge freight. One of the crew who had been assisting in unloading then attempted to board the moving train and, in doing so, he was injured.

Held, that the injury sustained by the employee resulted solely from his infraction of the regulation which he was obliged to obey and not from the fault of a fellow servant; that by disobedience to the regulation he had voluntarily exposed himself to danger from the moving train; that the negligence of the conductor in giving the signal to start the train was not an act for which the Government of Canada could be held responsible, and that its relation to the accident was too remote to be regarded as the cause of the injury.

Judgment appealed from (15 Ex. C. R.), affirmed.

Appeal dismissed with costs.

Lane, K.C., for the appellant.

P. J. Jolicoeur, for the respondent.

[3] Que. 10 K. B. 378.
[4] 7 Mo. P. C. 386.

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SUPREME COURT OF CANADA.

EXCH.] [JUNE 24TH, 1915.

THE QUEBEC, JACQUES-CARTIER ELECTRIC COMPANY v. THE KING: THE FRONTENAC GAS COMPANY v. THE KING.

Present: SIR CHARLES FITZPATRICK, C.J., and DAVIES, IDINGTON, DUFF, ANGLIN and BRODEUR, JJ.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

"Expropriation Act," R. S. C. 1906, c. 143, ss. 8, 23, 31—Abandonment of proceedings—Compensation—Allowance of interest—Construction of statute—Practice—Taxation of costs—Solicitor and client—Reimbursement of expenses—Interpretation of formal judgment—Reference to opinion of judge.

While the owners still continued in possession of lands in respect of which expropriation proceedings had been commenced, under the Expropriation Act, R. S. C. 1906, chap. 143, and before the indemnity to be paid had been ascertained, the proceedings were abandoned, no special damages having been sustained.

Held, that in assessing the amount to be paid as compensation to the owners, under the provisions of the fourth sub-section of section 23 of the Expropriation Act, there could be no allowance of interest either upon the estimated value of the lands or upon the amount tendered therefor by the Government.

The trial judge, by his written opinion, held that the owners were entitled to be fully indemnified for their costs as between solicitor and client and for all legitimate and reasonable charges and disbursements made in consequence of the proceedings which had been taken. The formal judgment provided merely that costs should be taxed as between solicitor and client.

Per DAVIES, IDINGTON ANGLIN and BRODEUR, JJ.—In the taxation of costs, the registrar should follow the directions given in the judge's opinion to interpret the formal judgment as framed. DUFF, J., *contra.*

Per DUFF, J.—The registrar, in taxing costs, is required by law to follow the terms of the formal judgment and it is not open to him to correct it in order to make it accord with his interpretation of the opinion judgment.

Appeal dismissed with costs.

E. A. D. Morgan, for the appellants.

Newcombe, K.C., for the respondent.

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CONTEMPORARY LEGAL REVIEWS AND PERIODICALS.[1]

The Solicitors' Journal and Weekly Reporter for August 21st contains some interesting remarks in reference to the admissibility of evidence of similar acts in criminal cases. In connection with the recent notorious bride-drowning case in England it says:—

'Every one knows that the Crown offered against Smith evidence showing that, on two occasions *subsequent* to that which was the subject of the indictment, he had contracted bigamous marriages with women possessed of property who had been found drowned immediately after the wedding in circumstances which in every case bore a strong resemblance. There is no doubt that, but for this evidence, no jury would have convicted the prisoner. Is such evidence legally admissible, and if so on what ground? Now, prior to the year 1893 we fancy it is almost certain that an English judge trying such a case at *nisi prius* would have refused to receive the evidence. But in that year the Judicial Committee held that, where two prisoners accused of murdering adopted children had *previously* adopted other children who had disappeared, and been found buried in the garden of houses temporarily occupied by the prisoners, these *previous* circumstances were relevant and admissible. There was, indeed, old common law authority for the admission of evidence in such cases, but the practice of the nineteenth century had been to limit as much as possible the class of cases where such evidence could be relied on. . . . But Smith's case was distinguished from the preceding leading cases in two ways; the similar acts relied on were *subsequent, not previous,* to that referred to in the indictment, and there could be no doubt that, but for them, the case against him would have been one of mere suspicion only. Of course, there is no logical reason why "*subsequent*" acts should not be relied on to prove a system of conduct, and indeed they are not infrequently relied on in practice. And certainly the case against Smith, even without the evidence in dispute, amounted to a *prima facie* case against him; it threw the burden of offering an

[1] It is by no means the intention of the C. L. T. to make this monthly feature a mere jumble of extracts. Our numerous exchanges from all over the Empire and from the United States are carefully examined as they come in, and attention called to whatever seems most striking and important in them. Ed. C. L. T.

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explanation upon him. It is not surprising, then, that the Court of Criminal Appeal held the evidence to be admissible. But the wider point, as to whether or not evidence of "similar acts" can be offered by the Crown before a *prima facie* case has been made out against the prisoner, was left undecided by the Court, so that the decision is not so useful as it might have been.'

The *Law Times* for August 21st, discourses upon Magna Charta in connection with the centenary of the sealing on June 15th last, and concludes with the following extract from Holinshed describing the effect upon King John of having had to sign it:—

'The King was right sorrowful in his heart, cursed his mother that bare him, the house that he was borne in, and the paps that gave him sucke, wishing that he had received death by violence of sword or knife, instead of naturall nourishment; he whetted his teeth, he did bite now on one staff and now on other as he walked and oft brake the same in pieces when he had done, and with such disordered behaviour and furious gestures he uttered his grief.'

Case and Comment for September, 1915, which is entitled 'Workmens' Compensation number,' contains many interesting Articles in connection with that subject. The first discusses the constitutionality, under the United States Constitution, of Workmens' Compensation and Compulsory Insurance Laws. The second in like manner discusses the Constitutionality of the statutory minimum wage. With these subjects we can scarcely be said to be concerned in this country, but the Article also deals with the subject of the minimum wage in its economic aspect. The writer says that advocates of the statutory minimum wage pass over the real essence of the controversy involved in it:—

'They choose not to see that the fixing of a minimum wage is of itself in a measure the fixing of a maximum wage, and that the fixing of a minimum wage by the legislature must in the end require, and at the same time justify, a legislative fixing of maximum wages, and that that must be followed by the statutory fixing of the prices of all commodities. If the legislature can forbid an employee to contract with an employer for a wage commensurate with his ability, it can com-

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pel that employee to work for a wage that is less than is commensurate with his ability. The principle of compulsory wages necessarily involves the principle of compulsory employment. For that reason, beside others, the leading representatives of labour, and particularly of the trades unions, shrink from the statutory minimum wage as a step toward slavery. Mr. Samuel Gompers, president of the American Federation of Labour, has so expressed his views in unqualified terms. President Wilson and others, who have studied the question from an impartial view-point, recognize that the ultimate tendency of the statutory minimum wage is to lower high wages rather than to raise low wages. They view such statutes as derogatory to the interests of the workers and of the community as a whole.'

We may mention in this connection that THE LAW TIMES for September 11th, has an Article dealing with the legal decisions under the Imperial *Coal Mines* (Minimum Wage) Act, 1912, 2 Geo. V., ch. 2.

There are also further Articles upon *Workmens' Compensation Acts,* and *Employers' Liability Acts,* and the first part of an Article upon '*Social Insurance*' by Mr. Henry W. Bullock, of the Indianapolis Bar, which promises a thorough discussion of that important subject. In the present instalment Mr. Bullock says:—

'Old age, disability, and retirement benefits for municipal policemen, firemen, and for school teachers are provided for in several States. About one per cent. of all corporations have sick, accident, relief, or old age funds. Those have beneficial results, but as a permanent system are wholly inadequate; the investment of their funds are not supervised by public authority; the funds are created from the wage fund of employees, but employees have no security of employment, as they may be discharged for any or no cause; they have a tendency to handicap employees by causing them to accept or continue labour under uncongenial conditions, and prevent the mobility of labour, as an employee seeking employment with other companies or in other States, where family ties, climate, or industrial conditions offer inducements, must forfeit participation in funds created by his labour. Sometimes these plans are the highly polished veneer seen by the public, whose purpose is to conceal an inferior wage system.'

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We learn from the *Law Notes* (Northport, N.Y.), that a question of some nicety was presented by the motion for a new trial in the *Becker case,* namely, whether evidence which was known to the accused, but which he did not communicate to his counsel, can be said to be newly discovered when communicated to them after conviction, and that Judge Ford held such evidence not to be ground for a new trial, in accordance with the few cases which have passed on the question. The *Law Notes,* however, say:—

> 'Technically this is undoubtedly good law, and a relaxation of the rule might open the door to fraud, since a false assertion of the client that he did not communicate the information could not be disproved by the prosecution. But does not an application to open a capital conviction for evidence which was not offered at the trial present a question broader than that of the right of the accused to be relieved from the consequences of his own mistake? That he who did not speak when he should will not be heard when he would speak, may be a sound rule in civil cases, but is it not a little drastic when a man's life is at stake? Over and above all rules of practice and questions of policy, the State should not put a man to death when there is evidence in existence which raises a reasonable doubt of his guilt. We do not assume that the evidence which was refused consideration in this particular case was of that class. But the rule would operate as inflexibly though the evidence shewed the innocence of the accused beyond the shadow of a doubt. Some safeguard against imposition must of course be interposed, even in a capital case, for it is in such a case that the motive for imposition is most compelling. But it would seem that if the matter were left in the discretion of an appellate bench the rights of the public would be adequately guarded, and the horrifying suspicion that an innocent man has been put to death on a technical rule of law 'be at the same time avoided.'

The *Law Journal* for August 28th asks:—

> 'Which are the three greatest novels dealing with the law? The *Globe,* referring to the *Law Journal's* selection of Charles Dickens' 'Bleak House,' Samuel Warren's 'Ten Thousand a Year,' and Anthony Trollope's 'Orley Farm,' says probably few lawyers or novel readers will quarrel with the choice. 'Felix Holt,' though it does not deserve a place in so short a list, is

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not unworthy of being mentioned in connection with it. On the nice point of law on which the plot turns, George Eliot was wise enough to consult Mr. Frederic Harrison, who was a practising member of the Chancery Bar before he took to literature and politics, and Mr. Harrison, before he finally advised her, sought the assistance of another 'junior' upon it. That 'junior' eventually became famous as Lord Herschell. Another novelist whose books are remarkable in their legal accuracy is Mr. R. D. Blackmore, who, like Mr. Samuel Warren, K.C., required no assistance in the construction of his legal plots, for he practised as a conveyancer in Lincoln's Inn before he became well known as a writer of fiction.'

The Solicitors' Journal and Weekly Reporter for September 4th, commenting upon this, says:—

'Ten Thousand a Year is surely the only real claimant to the leading place among legal novels. Its great advocate, Blossom and Box[1], is a wonderful caricature of Brougham. Mr. Mortmain and Mr. Frankpledge are immortal pictures of Chancery practitioners. Everyone has met three solicitors who resembled Quirk, Gammon, and Snap. All Warren's lawyers are real lawyers; all his legal scenery is the real thing. Can this be said of any other legal novel.'

A somewhat belated number of the *Virginia Law Review* for May last has reached us. To our loss we have not been hitherto aware of the existence of this Review, but if it is going to supply many Articles like the one on *The Constitutional Clauses of Magna Charta* by William A. Stuart, it will be indeed a welcome addition to legal periodicals. The writer shews, in a delightfully concise and lucid way, that the greatest constitutional value of the Charter has lain not in its construction, but in its misconstruction, not in what it really meant, but in what people thought it meant centuries later. For the transcendent period of the influence of Magna Charta was not the 13th century, but the 17th, when its provisions were appealed to and applied by people who attributed to them meanings which they never intended to convey. As Mr. Stuart says:—

[1] Our contemporary makes a curious slip here. Mr. Quicksilver is the advocate in *Ten Thousand a Year* who caricatures Lord Brougham.—Ed. C. L. T.

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'The conclusion of the whole matter, is that Magna Charta was a baronial document, a piece of class legislation. It was a list of concessions to the tenants *in capite* of the Crown for the conservation of the special privileges of their order. It was *not* a national Declaration of Independence. It did *not* contain any recognition of popular liberties. In fact, it was essentially a feudal pronouncement, and was applicable only to the conditions of a feudal State such as England at the time was.'

The famous clause, 'We will not sell, nor deny, nor delay to any right and justice,' was no promise of a pure and uncorrupted administration of justice. Its aim was simply 'to cut off the fat fees of the royal Courts in land cases. Henry II. had obliged the barons to come to his Courts for justice and to pay for it besides, whereas previously they had given it to themselves in the local Courts. They now determined that if they must come to the King's Courts, at least they would no longer pay fees. Hence *nulli vendemus* etc.,' means "we will no longer charge fees in our Courts."

The equally famous clause that no '*liber homo*' should be arrested, imprisoned, disseised, outlawed, or exiled, or in any way destroyed, unless by legal judgment '*parium suorum*' or the law of the land, was no promise of trial by jury, for no such thing as trial by jury in the modern sense was known at the time. '*Liber homo*' meant a man 'who held his land on terms of military tenure (*liberum tenementum*), i.e., quit of all burdens except the duty to render military service to the Crown when required.' The whole clause meant that the King promised that no tenant *in capite* should suffer arrest, imprisonment, etc., except by the lawful judgment of his peers, in other words, that: "The King's justices shall not decide criminal cases where a tenant *in capite* is the defendant, unless said justices be also of baronial rank;" a clause still law in England where a peer has the right to demand trial of a criminal charge before the House of Lords to this day, as witness the trial a very few years ago of Lord Russell before the House of Lords for bigamy. So, again, the clause that no *scutagium* or *auxilium* should be imposed in the realm *nisi per commune consilium regni nostri* was no promise of "no taxation without representation" as some have supposed. It simply meant that the King would exact no scutage or other feudal assessment or aid (except

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the three customary feudal aids, expressly named) from his tenants *in capite* without the consent of the baronial body 'composed on precisely the same principle as the present House of Lords.'

The *Solicitors' Journal and Weekly Reporter* for August 28th, contains the following interesting remarks in reference to the conversations between the United States and Germany respecting the torpedoeing of the Arabic by the latter:—

> 'It seems certain that after a shorter or longer period of inquiry into the facts the American Administration will demand of Germany redress and punishment of the offenders; if that is not received, severance of friendly relations must surely follow. Such severance may take two forms: War or the declaration of an "Embargo" against commerce with Germany. President Wilson is believed to have a deep disinclination against the declaration of war except in the last resort, and we are not certain that such a policy would really assist the Allies. It is doubtful if the American army and navy could greatly assist us, and the entrance of the United States into the world-wide war, by removing from industrial to military purposes great quantities of American labour and capital, would gravely affect the production of foodstuffs which we must buy from abroad and reduce seriously the market for our exports. On the other hand, the policy of "Embargo" would assist our commerce while winning for us the moral support of the United States. This policy of "Embargo" we may remark, is no new-fangled invention of President Wilson, as the daily press seems to suppose. It is the traditional policy of the American democratic party when faced with a breach of International Law. It was adopted shortly before 1812 by the great Jefferson—author of the Declaration of Independence—when his protests against our Orders in Council and impressment of seamen on American vessels proved unavailing. But it is apt to lead in the long run to war; and a year or two later England and the United States found themselves at war.'

The same number, also, has something interesting to say in reference to the attitude of the United States towards International Law. It writes as follows:—

> 'It is perhaps worth while mentioning here a point which is rather overlooked in most English comments

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on the International acts of the United States. There has always existed a different view as to the nature and origin of International Law on the part of American jurists from that entertained in England and on the Continent. In Europe our jurists are still dominated by the point of view of Grotius, who opens his treatise *'De Bello et Pace'* by saying in effect that war is a return from the artificial state of civilization to the natural state of hostilities. On this view of the *Jus Naturale*, which is rather implied than expressed by Grotius and his successors, it follows that there are no binding obligations between sovereign States except those which any State makes binding on itself either by inveterate usage on its part or by entering into a treaty. From this point of view, all International obligations between States are based either on 'estoppel'—the admissions of a State arising out of its immemorial customs—or on 'contract.' But American statesmen and jurists have always taken a deeper view, as is pointed out by Sir Henry Maine in his treatise on International Law. "The statesmen and jurists of the United States," he says, "do not regard International Law as having become binding on their country through the intervention of any legislature. They do not believe it to be of the nature of immemorial usage 'of which the memory of man runneth not to the contrary.' They look upon its rules as a main part of the conditions on which a State is originally received into the family of civilized nations. . . . Put in another way, it would probably be that the State which disclaims the authority of International law places herself outside the circle of civilized nations." In other words, American jurists regard the observance of International law as the condition precedent to recognition of any country as a civilized sovereign State. Consequently, when its rules are broken, they are not so much concerned with the injury to their own rights and the demand of redress for such injury as with the resulting effect on the legal status of the wrong-doing nation. Hence the idea of war to get redress for an injury to one's subjects and to vindicate national honour does not appeal so readily to American statesmen and jurists as to those of Europe. The sanction which does appeal to them is that indicated by their view of International law, namely, the boycott of the offending nation by refusing any longer to recognise it and treat it as a civilized State. This explains the American preference for a policy of "Embargo" over one of war.'

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The English *Law Times* for September 4th, contains the following interesting paragraph:—

> 'When Mr John Stuart Mill propounded his theories on the limitation of bequest, the proposal was looked upon as startling, but Professor Bamberger, the German economist, has put forth a project considerably in advance of that of our own philosopher. In the *Tægliche Rundschau*, Professor Bamberger, discussing the means of raising funds to meet the present requirements, advocates the reintroduction of a Bill which was before the Reichstag in 1908 and 1913, the object of which is to make the State the sole beneficiary of all persons dying without direct relations. The proposal seems to have been favourably received by the German Press.'

If this means that the suggestion is, that collateral relations should have no right, either under will or on intestacy, to share in personal property, except by grace of the State, it is certainly a sufficiently startling proposition. Such restrictions on the liberty of bequest as exist to-day in civil law countries, and in many of the States of the Union, are solely to protect the family of the deceased.

The *Central Law Journal* for September 17th, contains an Article of some length by Mr. Alex. G. Barret upon the recent Act of Congress known as the Clayton Law, which was finally passed on October 15th, 1914, and which declares unlawful four classes of acts which tend to restrain interstate commerce, and vests authority in the Federal Trade Commission to prevent them. It is of interest to notice what are the four practices thus forbidden. The first is discriminating in price between different purchasers of commodities sold for use in the United States, 'where the effect of such discriminating may be to substantially lessen competition or tend to create a monopoly in any line of commerce,' but it is provided that this is not intended to prevent discrimination on account of difference in quality or quantity, or difference in the cost of selling or transportation, or difference made in good faith to meet competition. The second prohibition is directed against "tying contracts," by which is meant contracts by which one makes a sale or lease of goods, whether patented or unpatented, for use in the United States, with the agreement that the lessee or purchaser shall not use or

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deal in the goods of a competitor for the lessor or seller, where the effect of such agreement 'may be to substantially lessen competition or tend to create a monopoly in any line of commerce.' This, however, does not forbid the purchaser of the goods from exacting a contract from the seller that he will not sell to any one else. The third prohibition is that, after two years from October 15th, 1914, no person shall be at the same time 'a director in any two or more corporations, any one of which has capital, surplus and undivided profits, aggregating more than one million dollars, engaged in whole or in part, in '(interstate) commerce' other than banks and railroads, if such corporations are competitors 'so that the elimination of competition by agreement between them would constitute the violation of any of the provisions of the anti-trust laws.' The fourth and last prohibition is that no corporation engaged in interstate commerce shall acquire the whole or any part of the capital of another corporation engaged in such commerce whether the effect may be to substantially lessen competition between the two corporations or to restrain commerce or tend to create a monopoly. So, too, "holding companies" are forbidden by the prohibition that no corporation shall acquire the whole or any part of the stock of two or more corporations engaged in commerce where the effect of such acquisition or the use of such stock may be to substantially lessen competition between such corporations or any of them whose stock is so acquired or to restrain commerce or tend to create a monopoly.

The New Jersey Law Journal for September is a good deal concerned with the proposed amendment introducing female suffrage into the State. which is to come before the qualified voters on October 19th. It makes one point in connection with the matter which is new to us:—

> 'The fact that taxes are assessed against women as the owners of property is no reason why there should be conferred upon them the right to vote, and the phrase "taxation without representation is tyranny," was never applied or intended to be applied by our forefathers to the case of voting. Thousands of aliens are taxed who cannot vote, and voting never was considered to be a right growing out of the fact that persons or property are taxed.'

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We have already noticed one interesting reference to the recent bride-drowning case in England from the *Solicitor's Journal and Weekly Reporter*. We find another in the *Notes from London* in the *Scottish Law Review* for September:—

> 'The result of the appeal of Smith "the bath murderer," was a foregone conclusion, except for one point which really gave the Court considerable anxiety. Until Mr. Marshall Hall, K.C., got to the point, I wondered what Smith thought of his chances of evading his well-earned doom. He was evidently a man of an intellectual type, one would have said refined and spiritual, if one had met him outside the dock. Some of his letters shewed much power of literary expression, and it was quite credible that he would be fascinating and plausible to women before imprisonment, and anxiety had quenched his natural exuberance and gush, I believe in nothing less than physiognomy. Looking at Smith I wondered what the secret was, as there was nothing to shew him to be, as far as I could ascertain from his features, the monster he really was. A few days before I heard the appeal of another murderer dismissed, who sat in the seat Smith occupied. He was a common soldier, uneducated and rude, and he had cut his child's throat. Yet, strange to say, the judge and jury had sympathised with him; the three judges of the Court sympathised with him; and, as for myself, I felt tears and a choking as I thought of the man's experience. He was a martyr, and Smith was a monster; and if I had met both I should in all probability have liked Smith and found him agreeable. I am almost forgetting the point which troubled the judges in the Smith case. Mr. Justice Scrutton, who tried him, had suggested that a drug might have been administered to the victims. This theory was not put forward by the prosecution, and, as it was not raised till the summing up, counsel for the defence could not deal with it. The Court said this was obviously advanced as a mere speculation, and the judge, though it would have been advisable not to go outside the actual facts, had not misdirected or misled the jury so as to do the prisoner an injustice. Mr. Justice Scrutton is one of the ablest of our judges, notably so; and it was his ability and ingenuity which betrayed him in a kind of trial in which he has not had much experience. What has given him his fame as a commercial lawyer and judge led him into a trap in a criminal trial. It would have

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been a disaster if his error had allowed Smith a chance of escape.'

We have also received the *Insurance Law Journal* (New York) for September, 1915, with its reports of current decisions in all the United States Courts; the *South African Law Journal* for August, 1915; and an issue of some New Zealand law reports, published at Christchurch, New Zealand, under the title *Gazette Law Reports.*

THE GAZETTES.

The Canada Gazette for September 4th, contains an Imperial Order in Council of July 28th, 1915, amending in certain particulars the Aliens Restriction (Consolidation) Order 1914.

It also contains a Dominion Order in Council of August 18th last, passed avowedly to relieve 'the present unemployment conditions,' providing that Chinese who register for leave of absence to re-visit China, may prolong their return to Canada without in any way affecting their right to free re-entry until six months after a proclamation has been published in the *Canada Gazette* declaring war no longer exists.

The Canada Gazette of September 11th, contains an Italian Royal Decree extending the blockade declared by the Royal Government to the whole zone of the Adriatic Sea to the north of the Otranto-Aspri-Ruga (Strade Bianchi) line.

It also contains a Dominion Order in Council of September 1st, 1915, bringing Part II. of the Canada Temperance Act into force in the County of Perth.

It also contains public notice that the general competitive examinations, under the direction of the Civil Service Commission of Canada will be held during the week beginning November 8th, next, at Toronto, and other places named.

The Canada Gazette for September 18th, contains a Proclamation proroguing the Dominion Parliament until October 28th, next.

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It also contains an Order in Council of August 25th last bringing into force new General conditions of carriage for Goods upon Canadian Government Railways.

The Canada Gazette for September 25th, contains the official notice of the award of the Victoria Cross to Lieutenant Frederick William Campbell, of the 1st Canadian Regiment, for most conspicuous bravery on June 15th last during the action at Givenchy.

It also contains the names of many Canadians upon whom the Emperor of Russia, has with the approval of the King conferred decorations for gallantry and distinguished service in the field.

It also contains an Order in Council prohibiting the exportation of wheat flour, wheat, barley, rye and other grains, except oats, to all foreign ports in Europe and on the Mediterranean and Black Seas, other than those of France, Russia (except Baltic ports), Italy, Belgium, Spain and Portugal.

The *British Columbia Gazette* for August 26th, contains the provincial Game Regulations, 1915, whereby the prohibitions declared by the Game Act as to the hunting, trapping, and killing of game, are removed to the extent and within the periods and limits mentioned.

The *Manitoba Gazette* of September 4th, 1915, contains a Proclamation further proroguing the provincial legislature to October 14th, 1915.

The *Saskatchewan Gazette* for September 15th, contains a provincial Proclamation staying legal proceedings, executions, sales for taxes, etc., against volunteers and reservists serving in the present war for a period of six months from April 21st, 1915.

Also a Proclamation that the provisions of Part III. of the Sales of Liquor Act, being Chapter 39 of the statutes of Saskatchewan, 1915, shall come into force on September 15th, 1915.

Also a Proclamation substituting new provisions for clauses 10, 11, and 12 of the Proclamation of August 9th, 1915, with regard to the seizure and sale of certain kinds of personal property under chattel mortgages or bills of sale intended to operate as such, conditional sales, lien agreements or hire-receipts.

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NEW BOOKS AND NEW EDITIONS.

The Canadian Constitution **as interpreted by the Judicial Committee of the Privy Council in its judgments, together with a collection of all the decisions of the Judicial Committee which deal therewith. By Edward Robert Cameron, one of His Majesty's counsel, and Registrar of the Supreme Court of Canada: Winnipeg, Butterworth & Co. (Canada), Ltd., Law Publishers, 1915, 825 pp. Size of pages 6¼ x 10.**

Mr. Cameron has done a good work which might well have been done before this, in collecting together and publishing at full length by themselves the decisions of the Privy Council upon our Constitutional questions, with the arguments as reported in the *Law Reports*. The enterprise of publishing all judgments of all Courts upon such questions which was undertaken by our provincial Government at one time, and continued up to 1897, when the fifth volume of Cartwright's Cases under the British North America Act was published, was wisely abandoned in that year. Canadian Constitutional cases, in the sense in which the term is generally used, are cases upon the construction of the British North America Act, 1867, and when the determination of the Court of last resort as to what the proper interpretation is has been arrived at, the speculations of the Courts below, however useful they may have been in aiding the Privy Council to speak the final word, lose value. All the reported decisions of the Privy Council, can as Mr. Cameron's book shews, be well printed in 627 good sized pages. These form the great bulk of Mr. Cameron's book. Of the rest of his book we cannot speak very highly. In the first part he gives a slight account of the different Courts, and in that connection he speaks erroneously as we think, of Imperial control through Courts of Justice, and through the prerogative right of appeal, as among the ways in which such control has been and is exercised over Canada. This seems to us an entire misapplication of terms. The Courts, including the Judicial Committee of the Privy Council, exist for the purpose of administering law and equity, and justice between litigants, and in no sense to exercise control, unless indeed it is control over legal vagaries.

Preceding the reports of the decisions of the Judicial Committee there comes a preliminary discourse upon the leading principles with regard to the interpretation of the British North America Act to be deduced from the decisions

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which follow. This part of the book seems well enough done so far as it extends; we notice, however, that Mr. Cameron has given no recognition to those who in previous works have sifted and arranged, and analyzed the material with which he deals, although we should imagine from the perusal of this part of his book that he has derived considerable assistance from them.

We have received the following Dominion Government Blue Books:—

Report of the Superintendent of Insurance of the Dominion of Canada for the year ended December 31st, 1914. Volume II., Life insurance companies; printed by order of Parliament.

Investigations into the Natural History of the Herring in the Atlantic Waters of Canada 1914. Preliminary Report No. 1, by Johan Hjort, Department of the Naval Service. Supplement to the fifth annual report of the Department of the Naval Service for the fiscal year ending March 31st, 1915.

List of shareholders in the Chartered Banks of the Dominion of Canada as on December 31st, 1914, in conformity with sec. 114 of the Bank Act, ch. 9 of the statutes of 1913.

LOCAL AND PERSONAL.

Dr. J. G. Delorimier, of the firm of Angers, Delorimier, Godin, and Delorimier, of Montreal, was among the survivors of the Arabic.

Captain Frank Morison (O'Heir and Morison, Hamilton), of the First Contingent, has won his D.S.O.

Gustave Lamothe, K.C., has been appointed a judge of the Superior Court for the district of Montreal, replacing the late Judge Simeon Beaudin.

Herbert Fenwick Stow, a well-known barrister in Calgary, has enlisted for active service. As the Calgary *Albertan* puts it 'he has not waited for any fancy frill commissions.'

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Miss Ruby Clements, of Vegreville, has been called to the Bar of Alberta, being the first woman in Alberta who has received that honour.

An honour Roll containing the names of thirty members of the Montreal Bar who have enlisted and gone to the front, embellished with the colours of the Allies, has been placed in a prominent position in the Court House at Montreal. The names on the Roll are:—Pierre Ledieu, George Williamson, T. W. Papineau, J. J. Creelman, Alex. G. Cameron, G. S. Lemesurier, W. B. Scott, Shirley G. Dixon, Pierre Beulac, K.C., M. Alexander, W. R. Hastings, G. Barclay, G. S. McDougall, C. A. Pope, Peers Davidson, K.C., G. A. R. Fleet, G. G. Greenshields, Aime Grothe, G. Jos. Sylvestre, R. Heserres, G. R. Vanier, H. Gerand, R. G. Moyse, C. G. Mackinnon, K.C., F. H. W. Bovey, L. de K. Stephens, G. H. Baker, R. Stockwell, G. R. Her, G. J. Waterston and R. L. Calder. Happily, on September 20th, when this was done, only one of the list, namely, Mr. Williamson, had been killed. Mr. W. B. Scott had been wounded.

Mr. C. R. Widdifield (Gordon and Widdifield), Peterborough, has joined the 59th Battalion for overseas service.

We regret to see the death reported of:—

Judge Blanchard, of King's County, P.E.I., at Charlottetown, on August 27th, last.

Murray J. McLeod, barrister, at North Sydney, N.S., of September 8th, inst.

George A. Boomer, barrister, Special Examiner; and for many years a Reporter of the High Court of Justice, at Toronto, on September 26th last, in his 70th year.

Frank Barns, law-student at Edmonton, son of Mr. Patrick Burns, of Brockville, Ont., killed in action at Langemarck in April last.

John P. Stanton, barrister, (who was practising at Kenora up to a short while ago, and before that at Dryden, and Hamilton), at Dryden, on September 29th last.

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HONOURABLE JAMES MACLENNAN, K.C.

FORMERLY A JUDGE OF THE SUPREME COURT OF CANADA

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HARVARD UNIVERSITY

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The Canadian Law Times.

VOL. XXXV. NOVEMBER, 1915. No. 11.

LAW SOCIETY OF UPPER CANADA.

MEMORIAL TO THE LATE HONOURABLE JAMES MACLENNAN, K.C.

The Honourable James Maclennan, retired justice of the Supreme Court of Canada and a Bencher *ex officio* of this Society, died at his residence "Torrleven," Murray Street, Toronto, on the 9th of June, 1915.

Mr. Maclennan was of Scottish descent and was born in Lancaster, County Glengarry, U. C., in the year 1833. He received his early education at the Williamstown Grammar School, from which he passed into Queen's University, Kingston, where he graduated in 1849. He was called to the Bar of Upper Canada in 1857, and for a short time practised his profession in Hamilton. Subsequently he moved to Toronto, where he formed a partnership with his relative Mr., afterwards, Sir Oliver Mowat, which continued until his appointment to the Bench. His practice at first lay chiefly on the equity side, but his merits as a sound, general and constitutional lawyer, soon obtained recognition, and his name is found in the reports of most of the principal cases of his time. He was a man of wide general learning and accomplishment, and he pursued and maintained to the last the interest of a student in subjects to which his University training had introduced him.

As a lawyer the ethical standards which he lived up to throughout a long professional career were those which the profession would most desire its members to observe.

Mr. Maclennan was an elective Bencher of the Society from 1871 to 1888, and as a member of the Legal Education, Discipline and other committees did valuable service.

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He was appointed Q.C. (Dom.), in 1873, during the Earl of Dufferin's administration, and by the Provincial Government (Ont.), in 1876.

On the 27th of October, 1888, during the administration of Sir John Macdonald, Mr. Maclennan was appointed Justice of the Court of Appeal for Ontario.

In that Court he remained until the 5th of October, 1905, when he was appointed a judge of the Supreme Court of Canada. He was retired, at his own request, in February, 1909, and spent the remainder of his days in Toronto. As a Bencher *ex officio* he attended the meetings of Convocation as frequently as his failing health would admit.

As a judge, Mr. Justice Maclennan maintained the highest traditions of the Bench. Industry and learning marked his work; courtesy, patience, and dignity, his judicial demeanour.

He was deeply interested in the cause of education which in many ways he was able to promote, whether as Senator of the University of Toronto, member of the Board of Public Instruction, or of the Educational Council of Ontario and of other institutions. His own University, of which he was a munificent benefactor, recognized his services and his value as a public man and an educationist by appointing him chairman of its Board of Trustees, and conferring upon him the degree of LL.D.

In politics Mr. Maclennan was a Liberal, and for a brief period represented the constituency of North Victoria in the House of Commons, but the real interest of his outward life always lay in the profession he adorned.

A just and upright judge, an efficient and valued member of this Society, Convocation records his loss with deep and sincere regret.

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BY THE WAY.

The Article on *The Shield of the Crown,* which we publish in our present number will, we think, be read with special interest in view of the proceedings in Manitoba against members of the late Government.

We have to ask our readers to wait until our December issue for the continuation of Mr. C. C. McCaul's important Article on *Options to purchase land,* which was commenced in our September number. We have, however, to introduce a new contributor to our readers in our present issue. Mr. Harold J. Laski is a young Oxonian who joined the staff of McGill University last year as assistant-professor or lecturer on history. He has also been entrusted with the duty of superintending the work of the School of Commerce at Montreal. His father, we are informed, was a Russian Pole who settled in England. Mr. Laski was an exhibitioner of New College, Oxford, and the winner of the Beit Prize and of a first class in Modern History. Two books by him,—*The Colonial Administration of Lord Grey* and *The Promise of Politics,*—are to be published during the coming winter, to which we shall hope in due course to introduce our readers.

In his Article on *Sovereignty and Federalism* in our present number, we think Mr. Laski is not altogether fair to John Austin. As Sir Henry Maine and Sir Frederick Harrison long since pointed out, Austin set about constructing an analytical science of pure law, after abstracting from his consideration all elements of the subject-matter with which the lawyer *as such* has nothing to do. To the lawyer there always is an omnipotent sovereign authority in the State, namely, that authority, be it of Monarch or of legislature, by which, directly or indirectly, the law with which he as a lawyer has to deal, is imposed or enforced. As a lawyer he has nothing whatever to do with any internal or external limitations existing in fact to that Sovereign's exercise of power. Mr. Laski, however, has, we think, developed in his Article an original and important aspect of Federalism; namely that it is a mistake to regard a Federal Constitution, as a mere *pis aller,* a polity to be resorted to only where a unitary system is not feasible, as Sir John Macdon-

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ald found to be the case with this Dominion. Mr. Laski emphasises the point, insufficiently dwelt upon by such writers as Mr. Dicey and Mr. Bryce, that Federal systems have a distinctive superiority of their own over unitary systems at least in this respect,—that they permit of a development and exercise of local self government of provinces or States, with all the advantages thereto accruing, in a way unitary polities do not.

Lawyers all over this continent will regret the recent death of Sir George Farwell. Sir George Farwell was called by Lincoln's Inn in 1871, and three years later published his Concise Treatise on Powers. He was made a judge of the High Court in 1899; and in 1906 he was promoted to be a Lord Justice of the Court of Appeal, and held that post until he retired in 1913. Speaking of him and of Sir Thomas Bucknill, who has also died, the English *Law Journal* of Octr. 9th, says:—'The careers of Sir George Farwell and Sir Thomas Bucknill, which to the sincere sorrow of the whole profession, have ended within the last few days, were, in some respects, strangely parallel. Both were born in 1845; both reached the Bench in 1899. Apart from these coincidences, however, there was little resemblance about them. Sir George Farwell was one of the strongest and most learned judges of our time. His judgments were expressed in virile and graceful English, and some of them, particularly that he delivered in the *Taff Vale Case*, were notable contributions to legal history. To his fine judicial temper he joined a rare independence of judgment, which found fitting expression in the protests he made more than once in the Court of Appeal against the encroachments of the Executive upon the province of the Courts. Sir Thomas Bucknill was a judge of a different type. Not by any special gift of legal scholarship did he win the high regard in which he was held; it was by the less conspicuous but not less important gifts he displayed as a *nisi prius* judge—his keen sense of fairness, his painstaking industry, and his breeziness of temperament—that he achieved the wide popularity he enjoyed. There was always something of the country squire about him, but nothing of his narrowness. Everybody will regret that Sir George Farwell and Sir Thomas Bucknill, after a long record of Judicial service faithfully per-

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formed, did not live longer to enjoy the leisure they had so well earned.

The Ontario enactment, 8 Edw. VII., ch. 54, sec. 11, provides that where a local option by-law is declared by the Returning Officer to have received the votes of three-fifths of the electors voting thereon, and is after such declaration quashed or set aside, *or held to be invalid or illegal,* no tavern or shop-license shall be issued in the municipality in which the by-law was submitted . . . until the first day of May in the year in which a repealing by-law might have been submitted to the electors had the first-mentioned by-law been declared valid, *without the written consent of the Minister first had and obtained.*' As Hodgins, J.A., says in the late case of *Re Sharp and the Village of Holland Landing*— "The power of the Court as to quashing by-laws is now, so far as local option by-laws are concerned, practically transferred to the Executive of the province. This change was introduced in 1908, and, while the Court is still bound to decide according to law and may yet quash a by-law, *the effect of its decision is dependent on the assent of the Minister*;" who, we may add, is defined in the Act as the member of the Executive Council to whom for the time being is assigned the supervision of the administration of the Liquor License Act. Now sound principles of legislation are more important than even local option by-laws, and legislation of such a character as this invites criticism. The Municipal Act and the Liquor License Act prescribe certain formalities as requisite to the passage of local option by-laws. But under the above legislation power is vested in the Minister to dispense with these requirements, and over-ride the decision of the Courts that they have not been complied with. Parties interested who consider that the law has not been complied with in the passing of the by-law, and who, on taking action, are sustained in their contention by the Courts, are liable to find themselves deprived of the benefit of the law at the arbitrary will of the Minister. This we submit is legislation of a mischievous kind, and calculated to diminish respect for the rule of law, to say nothing of respect for the Courts. The Bill of Rights of 1689 registered a notable triumph for popular Freedom against royal power when it enacted that 'From and after this present session of Parlyament, noe dis-

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pensation by *non obstante* of or to any statute or any part thereof shall be allowed but the same shall be void and of noe effect.' So ended the royal dispensing power. No doubt in the case of our Ontario Act 'the dispensation is allowed of in such statute,' but do we in Ontario desire to see the dispensing power revived and placed in the hands, not even of the representative of royalty, but in the hands of a mere temporary holder of office under the Crown? Eternal vigilance is the price of liberty.

Our contemporary the *Canada Law Journal* in its issue for October, contains a leading Article entitled—*Is Christianity part of the law?* But although it commences in this interrogative form, it ends with the categorical statement that 'Christianity is still part of the law of England.' No authorities for this proposition is to be cited, but for this the writer of the Article is not to be blamed. There are none. The statement rests on nothing more substantial than an *obiter dictum* of Lord Hale in 1676 in the case of Rex v. Taylor, that "Christianity is parcel of the law of England," and that therefore to reproach the Christian religion is to speak in subversion of the law. The *dictum* was purely *obiter* for Lord Hale was dealing with the objection that blasphemous words which the defendant Taylor had uttered were punishable only in the Ecclesiastical Court. He held that they were cognisable also in a Secular Court, because they were a danger to the State. The argument was obviously not a sound one because it is not criminal to speak or write either against the common law of England generally, or against particular portions of it, provided it is not done in such a manner as to endanger the public peace by exciting forcible resistance. As has been said, Lord Hale's *dictum* that Christianity is parcel of the law of England "is a pleasant phrase to quote, but it has no precise meaning." In England, as on the North American continent, the law protects the Jewish religion, and other beliefs which are opposed to Christianity, and permits Jewish synagogues to exist in every city. London and Liverpool have their Hindoo and Mahommedan Temples, just as Seattle has its Buddhist Temple, San Francisco its Hindoo Temple, Los Angeles its Khrishna Temple, Chicago its Zoroastrian and Mahommedan Temples. If Christianity was part of the law of England or of the United States

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these would all be illegal institutions. The truth in this matter seems to be this: Christianity is the religion of the Church as by law established in England, and has had a large share in making English law. The morality of a country is always reflected in its legal system, and the morality of England and the United States is a Christian morality. In no other sense is Christianity part of the law of England. We leave the *Canada Law Journal* to its "pleasant phrases," but, for our part, prefer those which have "some particular meaning."

In the recent case before the Supreme Court at Ottawa of *The Linde Canadian Refrigerator Co.* v. *The Saskatchewan Creamery Company,* contained in the number of Supreme Court Reports for September, the question was whether a company which had its chief place of business in Quebec, and was incorporated under Dominion statute should or should not, have had a certain action brought by it dismissed, on the ground of non-compliance with the Saskatchewan Foreign Companies Act. The appeal was from the Supreme Court of Saskatchewan, which affirmed the judgment of the trial judge dismissing the action. Idington, J., held that the appeal should be allowed on the ground that what the extra-provincial company had done did not constitute the carrying on of business in the province of Saskatchewan within the meaning of the said Foreign Companies Act. Anglin, J., held the appeal should be allowed, not on that ground, but because under the Privy Council decision in the *John Deere Plow Company case,* the requirements of the Saskatchewan Act were *ultra vires.* The Chief Justice simply says, as reported, "I am of opinion that this appeal should be allowed without costs." Duff, J., says only—"I concur in allowing this appeal." Brodeur, J., says only—"I am of opinion that this appeal should be allowed with costs." Now, with great respect, we submit that this is a very unsatisfactory way of disposing of a case, and deprives the report of almost all its value. It leaves the profession quite in the dark whether the Chief Justice, and Duff, and Brodeur, JJ., concurred in Idington, J.'s, view, or whether they concurred in Anglin, J.'s, view; or whether they had some other recondite reasons of their own for holding that the appeal should be allowed.

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London *Truth* in its issue of September 22nd last made the following statement:—

> 'In deference to Canadian sentiment it was announced some time ago that the Privy Council would hear no more appeals from the Canadian Supreme Court except on constitutional issues. It was a wise decision for appeals to the Judicial Committee are a luxury in which only wealthy litigants can indulge and the spectacle, for instance, of a railway company getting absolved in London for the payment of some damages some poor person has been awarded in the Canadian Courts provoked much undesirable feeling.'

Shakespeare says—

> 'Doubt that the sun is fire,
> Doubt that the stars do move,
> Doubt that *Truth's* a liar,
> But never doubt my love.'

We have taken the trouble to communicate with London on the subject of the above statement, and find, as we expected, that it is quite inaccurate. It would be indeed a deplorable thing if it were true. What *Truth* omits to mention, or is ignorant of, is that in cases where to give leave to appeal would be a real hardship on the respondent, the Judicial Committee can, and does, and has within the last few months, granted leave only upon terms that the appellant pay all the respondent's costs, as between solicitor and client, no matter what the result of the appeal. As a matter of fact appeals from the Canadian Supreme Court to the Privy Council, on other than constitutional issues, are at this present moment, pending. *Sic semper esto.*

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MR. JUSTICE MASTEN.

The appointment of Mr. C. A. Masten to a seat on the Bench of the Supreme Court of Judicature of this province has, we believe, been greeted with the utmost satisfaction by the profession. Everyone knows the old story of Lord Melbourne who, when consulted by a new Governor-General of India on the subject of appointments to judgeships said—"See that your judges are gentlemen, and if they know a little law, so much the better." Mr. Masten is a gentleman, and knows a good deal more than a little law. Mr. Justice Masten came from Chambly, in the province of Quebec, some thirty-five years ago and has practised law in Toronto ever since. Oldsters amongst us will remember that in the eighties he was one of the principal Counsel who appeared at Osgoode Hall daily in those palmy days when there was a great deal of agency and practice work going on there. His contemporaries at Osgoode Hall at that time and in that department of work were Sir Allen Aylesworth, Mr. G. H. Watson, K.C., Dr. Hoyles, K.C., Mr. C. J. Holman, K.C., Mr. G. H. Shepley, K.C., and others. At one time Mr. Masten was a member of Mr. Watson's firm, and subsequently became a member and head of the firm of Masten, Starr and Spence, from which he has just retired. He has somewhat specialized in company law, banking law, as one of the counsel for the Bank of Nova Scotia, and in the law relating to patents of invention and trade marks. Every lawyer knows *Masten on Company Law.*

Mr. Masten has held briefs before the Privy Council, as for example, in the famous *Alberta and Great Waterways Railway case,* a year or two ago. He conducted the Union Life Insurance Company investigation, and was afterwards of counsel for the Crown, with the late Mr. DuVernet in the criminal prosecution which followed. The *Calgary Gas case,* again, was a western *cause célèbre* in which Mr. Masten figured. We have much pleasure in reproducing his reply to the congratulations of the Bar on the occasion of his first taking his seat on the Bench:—

> "I am more touched and grateful than I can express at the kind remarks which you have addressed to me, but I am not vain enough to attribute them merely as a personal tribute to myself but rather as an expression of the respect and confidence which the bar reposes in the Bench of this Province.
>
> I need not say that to have been invited to become a judge of the Province of Ontario is an honour which

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I esteem one of the greatest of my life. As Mr. Asquith said not long ago:—

"The Common Law of England has been, still is and will continue to be here and wherever British communities are found at once the organ and the safeguard of British justice and British freedom."

To assist in its application to the varying circumstances arising in the larger and fuller development of this Canada of ours is a noble and worthy task, and when one considers the judicial history of the province from the time of Chief Justice Osgoode, and recalls names of the great judges who have adorned that history through more than a century, one can only say "there were giants on the earth in those days," and I hope to be able to follow humbly in their footsteps striving toward the judicial standard which they set and maintained so high.

But the pride which I feel in being permitted to inscribe my name on the Roll of Ontario judges is less than the gratification which arises from the approbation and appreciation of those among whom the laborious days of my life have been so largely spent, and I trust that the respect and confidence which on behalf of the Bar you have expressed toward me may hereafter be justified and maintained.

Experience has led me to an appreciation of the difficulties which without default practitioners sometimes experience in promptly meeting all their engagements in Court. I hope none of you will expect adjournments on *præcipe*. If so I am afraid you will be disappointed; but I think I can promise that when unavoidable exigencies arise their adjustment will have the sympathetic consideration of the Court.

The active practice of our profession for more than thirty years has led me to entertain for my confrères at the Bar a strong sentiment of respect and confidence. I know of no reason why in the new relationship that now arises between us that sentiment should change on my part. I can only trust that I may hereafter, to some degree, merit the approbation which you have too generously expressed. So far as earnest striving to ascertain facts and a faithful endeavour to apply the principles of our law will carry me, I shall try to secure that approval.

In conclusion it is a special pride and happiness to me to receive the too flattering assurance of your esteem and goodwill. No one knows so well as I do how much too flattering it is. None the less the memory of your words will serve throughout the years to come to encourage to stimulate and to fortify me in the fulfilment of the high duties that now devolve on me."

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THE EARLY COURTS OF THE PROVINCE.

By The Honourable William Renwick Riddell, LL.D., F.R. Hist. Soc., etc., Justice of the Supreme Court of Ontario.

I.

The judicial history of that part of British America which is now our Province lends itself to a division into four periods.

1. Before the King's Bench Act, (1794) 34 Geo. III. c. 2. During all this period the Superior Courts of civil jurisdiction in the province of Upper Canada were the four Courts of Common Pleas, one in each District. From and after 1792, 32 Geo. III. c. 6, there were also Courts of Requests for small debts, which ultimately and long after became our Division Courts.

2. From the establishment in 1794 of the Court of King's Bench till 1837, when by the Act, 7 Wm. IV., c. 2, a Court of Chancery was established. The King's Bench was the only Superior Court: the Courts of Requests were continued and intermediate District Courts (which ultimately became County Courts) were established in 1794 by 34 Geo. III., c. 3.

3. From the erection of the Court of Chancery in 1837 till 1881 when all the Superior Courts, *i.e.*, the Court of Queen's (King's) Bench, the Court of Common Pleas established by (1849) 12 Vic. c. 63 and the Court of Chancery as reorganized by (1849) 12 Vic. c. 4, were combined (with the Court of Appeal) in one Supreme Court of Judicature by the Statute (1881) 44 Vic. c. 5.

4. The period of unification since that Statute. Trifling, and perhaps also important, changes have been made but not such as to affect the principle; the County and Division Courts have been continued: I do not think it necessary to do more than mention the new District Courts, which are in effect temporary inferior Courts in the unorganized parts of Ontario.

In the first period Law and Equity were rather loosely combined: in the second, there was no equitable jurisdiction: in the third, Law and Equity were administered by different

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Courts (speaking generally), and in the fourth there is the complete and formal fusion of Law and Equity.

Only the first period is to be dealt with in these papers.

When by the Treaty of Paris, Canada was ceded to Britain in 1763, the number of white settlers in what afterwards became the province of Upper Canada and later the province of Ontario, was very small—and the chief part of that small number was on the south or left bank of the Detroit River. The first official report we have of that settlement[1] shews that in 1752 there were twenty 'habitants établis sur le côte sud de la rivière.' These were continually increasing in number till in 1761 we find between three and four hundred of a population. In this year the settlement was detached from the parish of Ste. Anne de Détroit and attached to the parish of the Huron Indians at L'Assomption (Sandwich)[2]. They remained subject to the civil rule of the Governor of Detroit and the whole settlement was considered an appendage of Detroit.

All other settlers in what is now Ontario (if there were any) were close to and considered as belonging to the several military stations and forts.

During the period of French domination, the Commandant at the Fort was the judge and exercised almost unlimited power; and in this territory practically the same rule obtained after the British Conquest for a time.

In 1763, Murray received power[3] as Captain-General and Governor-in-Chief of the province of Quebec to erect Courts of Civil and Criminal jurisdiction within the province of Quebec—this province was formed by Royal Proclamation of October 7th, 1763; it contained all the territory now the provinces of Ontario and Quebec and included also the Detroit country.

Accordingly, September 17th, of the following year[4] Murray established a Court of King's Bench for the province to

[1] See "Notes Historiques sur la Colonie Canadienne de Détroit," by Mr. Rameau, Montreal, J. B. Rolland & Fils, 1861, at p. 30.

[2] *Ibid.*, p. 30 *ad fin.*

[3] See his commission, Nov. 21st, 1763, "Constitutional Documents, 1759-1791," Short & Doughty, Canadian Archives Report, 1905, vol. 3, pp. 126-132; his instructions, *ibid.*, p. 132 *et seq.*, Ont. Archives Report for 1906, pp. 7 *et seq.*

[4] "Ordinances made for the Province of Quebec, etc.," Quebec, 1767, pp. 6-9. (Where it is, in these papers, stated that a "Governor" made an Ordinance, etc., what is meant is, of course, "Governor-in-Council.")

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sit at Quebec and with jurisdiction in all cases civil and criminal. This Court was presided over by the Chief Justice of the province: and an appeal lay from his decision to the Governor and Council, (including the Chief Justice), in cases of over £300 sterling: where the amount in dispute was £500 sterling or more an appeal lay from the Governor and Council to the King in His Privy Council.

It had been intended that the Chief Justice should sit twice a year in a Court of Assize and General Gaol Delivery at Montreal; but this was found unnecessarily expensive, and the direction was given that this Court should sit only once a year at Montreal, as well as once a year at Three Rivers. In these Courts the trials were by jury.

At the same time[5] a Court of Common Pleas was established with civil jurisdiction only and that only in cases above £10. In cases above £20, an appeal lay to the Court of King's Bench: in cases over £300 to the Governor and Council, with a further appeal to the King in Council in cases of £500 and upwards. This Court had three judges: it sat at Quebec and Montreal and was intended "only for Canadians" i.e., French-Canadians.

The province was divided into two Districts by the Rivers Godfroy and St. Maurice: and Courts of Quarter Sessions[6] were formed for these Districts, to sit at Quebec and Montreal respectively every three months. Three or more Justices sitting in Quarter Sessions could hear and determine actions above £10 currency ($40) and not exceeding £30 currency ($120) subject to an appeal to the Court of King's Bench. Any one Justice of the Peace could decide cases in his District not exceeding £5 currency ($20) and any two Justices, cases not exceeding £10 currency, ($40), no appeal being allowed in either case. Two Justices of the Peace were to sit weekly in rotation at Quebec and Montreal for these purposes.

The Courts of Quarter Sessions had also their common law jurisdiction in criminal cases.

The jurisdiction of the Courts of King's Bench and Common Pleas extended, of course, over what is now Ontario as did that of the Quarter Sessions and Justices of the Peace of the District of Montreal.

[5] By the same Ordinance, pp. 6, 7.
[6] *Ibid.*, p. 7.

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In the Court of King's Bench all cases were to be decided 'agreeable to the Laws of England and to the Ordinances of (the) Province.' In the Court of Common Pleas the judges were 'to determine according to Equity having regard nevertheless to the law of England as far as the circumstances and present situation of things will admit'; but in cases in which the cause of action arose before October 1st, 1764, the French laws and customs were to be followed where the actions were between natives of the province: no express direction is given for the law to be administered by the Justices of Peace in or out of Sessions, but no doubt the same course was expected to be followed by them as in the Court of Common Pleas.

In Criminal cases the existing criminal law of England governed.

The well-known Governor Sir Guy Carleton in 1770[7] abolished the civil jurisdiction of the Justices of the Peace in and out of Sessions: and directed all cases not exceeding £12 currency ($48) to be tried by the judges of the Courts of Common Pleas. The former Court of Common Pleas had sat both in Quebec and in Montreal: but now there were to be two independent Courts one in Quebec, the other in Montreal, limited in local jurisdiction to their own Districts, open at all times except Sunday and certain vacations. One judge was to sit every Friday to try cases not exceeding £12.

The English civil law never recommended itself to the French-Canadians: the new settlers from the British Isles and English colonies preferred it, and there was much agitation for and against a change. The French-Canadian prevailed; the Act of 1774, 14 Geo. III. c. 83, reintroduced the French civil law, at the same time repealing all the Ordinances, Commissions, etc., of the Governors.

Carleton was instructed[8] to create a Court of King's Bench for the province for criminal cases: and, dividing the province into two districts, to establish a Court of Common Pleas for each District with jurisdiction over all civil cases, 'cognizable by the Court of Common Pleas in Westminster Hall.' The Court of King's Bench was still to be presided over by the Chief Justice: each Court of Common Pleas was

[7] Const. Docs., pp. 280 *seq.*, Ordinance dated February 1st, 1770.

[8] *Ibid.*, pp. 419 *seq.*, dated January, 3rd, 1775.

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to have three judges, one Canadian and two from the British Isles or "Our other Plantations."

It was also intended that there should be an Inferior Court of King's Bench for 'each of the Districts of the Illinois, St. Vincenne, Détroit, Missilimakinac and Gaspée' but nothing came of this as the American Revolution intervened. *Inter arma silent leges.* But it was necessary in view of the repeal of all the former Ordinances, etc., to erect some kind of judicial system in the older parts of the British dominions. In 1775 three judges under the name of "Conservators of the Peace" were appointed for each of the Districts of Quebec and Montreal although nothing was done for the outlying regions.

Arnold and Montgomery's invasion coming to nought, Carleton in 1777 made an Ordinance[9] dividing the province into two districts at the River Godfroy and St. Maurice, establishing a Court of Common Pleas in each District, each to sit on one day in each week (excepting 'three weeks at seed-time, a month at harvest, and a fortnight at Christmas and Easter, and excepting during such vacations as shall be appointed by the judges for making their circuits twice every year') to hear cases up to £10 sterling, and on another day to hear those above £10 sterling. Under £10 one judge could sit: for £10 and over, two were required: in the first case unless the matter in controversy related to a duty payable to the Crown, fee of office, annual rent, or such like matter where future rights might be bound, there was no appeal; in the latter an appeal was allowed to the Governor in Council on security being given. A further appeal lay to the King in cases involving £500 or more, on security being given—this appeal lay also in the excepted classes of cases above mentioned. Very elaborate regulations were prescribed for the practice which may be passed over for the present.

In the same year[10] a Court of King's Bench was established with criminal jurisdiction to hold two sessions each year in each of the cities of Montreal and Quebec. A Court

[9] *Ibid.*, pp. 464 *seq.*, dated February 25th, 1777, "Ordinances made and passed . . . Province of Quebec," Quebec, 1777, pp. 1-8 (Osgoode Hall General Library, D 2935). This Ordinance is 17 George III. c. 1.

[10] Const. Doc., pp. 471 *seq.*, dated March 4th, 1777. "Ordinances, etc. (*ut supra*), pp. 39 *seq.* This is Ordinance 17 George III., c. 5.

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of Quarter Sessions to sit four times a year was erected for each district.

Detroit with the adjoining territory on both sides of the river was of course in the Montreal district from the first division of the province; but for some time, this remote region lived an almost independent juridical life. The Governors appointed Justices of the Peace with large powers —indeed one of these Justices, Dejean, in 1776 went so far as to try a man and a woman for arson and larceny with a jury of six English and six French. On a conviction, the man was hanged, it is said, by his fellow convict, who thus saved her own neck. For this both the Governor, Hamilton, and the magistrate were presented by a Montreal Grand Jury: but their offence was forgotten or at least condoned by reason of the troubled state of the country.

For a time a Board of Arbitrators formed by the merchants at Detroit filled the place of a court for the merchants and traders: the habitant had no Court and does not seem to have needed one.

The Treaty of Peace in 1783 brought a very large number of immigrants from the revolted colonies: most of these settled along the international rivers, and their numbers rapidly increased. This new element demanded Courts: in Detroit particularly the arbitration system became unsatisfactory and the great length of time needed to obtain and serve process from the Court at Montreal became a matter of much complaint.

Carleton at length in 1788 [11] solved the difficulty by dividing the new country (i.e. Canada, west of what is now the province of Quebec) into four Districts—Luneburg 'to the mouth of the River Gananoque,' Mecklenburg to the River Trent, Nassau 'to the extreme projection of Long Point into the Lake Erie' and Hesse west thereof.

In each of these Districts, there was established a Court of Common Pleas with three judges, with unlimited civil jurisdiction and it is (mainly) of these Courts of Common Pleas it is proposed to speak in these papers.[12]

[11] Const. Doc., p. 651, dated July 24th, 1788: Ont. Arch. Report for 1906, pp. 157, 158.

[12] Mention should perhaps be made of the local and temporary Courts which were established in 1785 for what is now the eastern part of Ontario 'for the ease and convenience of His Majesty's subjects who have settled or may settle in the upper part of this province from and above point Baudet, on the north side of Lake St. Francis to the head of the Bay of Quintiz, on Lake Ontario.'

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II.

The state of affairs when the province of Upper Canada came into existence in 1791 [18] was that the province was divided into four Districts, Luneburg, Mecklenburg, Nassau and Hesse, and in each of these Districts was a Court of

A large number of United Empire Loyalists had settled and more were expected to settle along the River St. Lawrence and Lake Ontario, including the Bay of Quinte (Quintiz), and provision was made by Ordinance, 25 Geo. III., c. 5, for them.

From and after September 1st, 1785, any justice of the peace was empowered to issue one or more writs of summons to call before him any person or persons residing within the district and hear and determine any matter in dispute for the recovery of any debt respecting personal estate where the sum demanded should exceed 2s. 6d. (50 cents) and not exceed 40s. ($8). Any two justices of the peace might issue writs of summons and try like cases where the sum demanded exceeded 40s. and did not exceed £5 ($20). The trial Court could issue writs of execution for the debt adjudged and costs of suit, which costs were not to exceed 3s. (60 cents) in the first case or 5s. ($1) in the second: the debt might be ordered to be paid in instalments, but all within four months. There was no appeal from these Courts.

It will be seen that the territory thus provided for was precisely that which became the Districts of Luneberg and Mecklenburg—a similar provision was in and by the same Ordinance made for the far east of the province which in 1788 became (in part) the District of Gaspée.

No provision was made for the settlers on the Niagara or the Detroit. I find no record of any litigation in the Court of Common Pleas of Montreal from the Niagara district, though there was considerable from the town of Detroit.

[18] The division of the Province of Quebec into two provinces, i.e., Upper Canada and Lower Canada, was effected by the Royal Prerogative: see 31, Geo. III., c. 31, the celebrated Quebec Act. The message sent to Parliament expressing the Royal intention is to be found copied in the Ont. Arch. Reports for 1906, p. 158. After the passing of the Quebec Act, an Order in Council was passed August 24th, 1791 (Ont. Arch. Rep. 1906, pp. 158 *seq.*), dividing the province of Quebec into two provinces and under the provisions of sec. 48 of the Act directing a Royal warrant to authorize 'the Governor or Lieutenant-Governor of the Province of Quebec or the person administering the government there, to fix and declare such day as they shall judge most advisable for the commencement' of the effect of the legislation in the new provinces, not later than December 31st, 1791. Lord Dorchester (Sir Guy Carleton) was appointed, September 12th, 1791, Captain-General and Governor-in-Chief of both provinces and he received a Royal warrant empowering him to fix a day for the legislation becoming effective in the new provinces (see Ont. Arch. Rep. 1906, p. 168). In the absence of Dorchester, General Alured Clarke, Lieutenant-Governor of the province of Quebec, issued, November 18th, 1791, a proclamation fixing Monday, December 26th, 1791, as the day for the commencement of the said legislature (Ont. Arch. Rep. 1906, pp. 169-171). Accordingly technically and in law, the new province was formed by Order in Council, August 24th, 1791, but there was no change in administration until December 26th, 1791.

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Common Pleas of unlimited Civil but no Criminal jurisdiction. In each of the Districts, too, there was a Commission of the Peace, the Justices of the Peace forming the Court of Quarter Sessions—before December 26th also the Court of King's Bench of the province of Quebec had criminal jurisdiction but all the original criminal jurisdiction was exercised by Courts, sitting from time to time under Commissions of Oyer and Terminer—these with Courts of Quarter Sessions were the Courts dealing with criminal matters.

The Courts of Common Pleas were presided over each by three judges, (not skilled lawyers) with the exception of that of the District of Hesse. Many of the inhabitants of this District were Canadians, i.e. French-Canadians.

With that tenderness and regard for the conquered people which almost invariably characterized the British conqueror, Sir Guy Carleton had in his Instructions of January 3rd, 1775,[14] been directed when establishing Courts of Common Pleas in the two existing Districts of the province of Quebec to appoint three judges for each of these Courts 'that is to say, two of our natural born subjects of Great Britain, Ireland or our other Plantations and one Canadian'[15] i.e. French Canadian. Before this time there had been four judges in all for both Districts, three natural born subjects and one a Canadian.[16] The Instructions of 1775 were superseded by those of August 23rd, 1786,[17] which contained no such provision; but the spirit of the former Instructions continued to be carried out. Accordingly where the Districts were created by the Proclamation of 1788 and Courts of Common Pleas came to be formed in and for each, or that one District, Hesse, which contained a considerable number of Canadians, the Court of Common Pleas received one judge a French-Canadian, with two natural born British subjects—

[14] Ont. Arch. Rep. 1906, p. 58 *seq.*, esp. p. 63.

[15] It is worthy of remark as illustrating the consideration paid to the Canadians that in the proposed local Courts of King's Bench intended to be set up in the 'District of the Illinois, St. Vincenne, Detroit, Missilimakinac and Gaspé,' while the single judge was to be a natural born subject, there was to be associated with him 'one other person being a Canadian by the name of Assistant or Assessor, to give advice to the judge in any matter when it may be necessary.' The districts named were inhabited mainly by French-Canadians.

[16] See Proclamation of April 26th, 1775, Ont. Arch. Rep. 1906, p. 92.

[17] Ont. Arch. Rep. 1906, pp. 135 *seq.*

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there were Duperon Baby, Alexander McKee, and William Robertson.[18]

[18] Duperon Baby of an old French-Canadian family: one account is that his ancestor was a merchant of Three Rivers, who visited Detroit in 1703, and a little later established a branch of his family there (Colonie Canadienne de Détroit, p. 12). Another and apparently a better account is that Duperon was the son of Raymond Baby, of Montreal, and after serving with credit in the West under the orders of the Commandant of Fort Duquesne, came with his brother Louis after the conquest and settled in Detroit ("Les Canadians du Michigan," p. 135). Duperon Baby was born in 1738 and became a prominent citizen of Detroit, and a trader of great enterprise. At the time of the conquest of Canada by the British, he was at Fort Pitt: he declined to take the oath of allegiance and desired to go back to Detroit, Michilimackinac, and Montreal to recover his debts, and pass to France: Bouquet hesitated to let him go on account of the influence of Baby's family among the Indians. Leave was ultimately given, and Baby went to Detroit. During the Pontiac siege, he encouraged Major Gladwin, and on the final cession of Canada, he seems to have become a loyal British subject—he was appointed Interpreter and Captain in the Indian Department, and was a prominent and trusted official. He took a leading part in society: it is of record that his dancing bills for one winter was over £20. At the time of his appointment as judge, he was the only French-Canadian trader in Detroit, and the chief objections to his appointment (in which he fully shared) were his ignorance of law and his large business connection. He was appointed a member of the Land Board for the district of Hesse and rendered valuable services in interpreting and otherwise. He died at Sandwich in 1789, having in his by no means long life seen Detroit owned by the French, the British and the Americans.

The family does not seem to have been of the noblesse, but it was of the highest respectability, and members of it played some part in the after history of Upper Canada.

Alexander McKee (the name was also frequently written McKay), a native of eastern Pennsylvania, was Deputy Indian Agent at Fort Pitt (Pittsburg) as early as 1772: he was a Justice of the Peace and carried on a large and lucrative business there at the time of the American Revolution. He was, with others, imprisoned by General Hand, of the American forces, in 1777, but released on parole. Threatened with a renewed imprisonment, he made his escape in 1778 with the noted Simon Girty and others and came with them to Detroit. Appointed an Interpreter and Captain in the Indian Department, he took part in practically all the operations of the Loyalist troops in that part of the world. He was present at many meetings with the Indians, over whom he had a very great influence.

He went into business at Detroit and was appointed Deputy Superintendent of Indian Affairs—later in 1794, he became a member of the Land Board of Hesse (at Detroit) and received large grants of land. He died in 1799: his descendants are still prominent members of society in and near Windsor. He was a man of the strongest character and his services were invaluable to the British cause.

William Robertson was a Scotsman and a trader in Detroit in a large way. He was much in the confidence of the authorities—he became a member of the Hesse Land Board, which for a time sat at his house. He left for England in 1790: while absent from the country, he was recommended by Lord Dorchester as one of the Legislative Councillors for the proposed province of Upper Canada. He was so nominated, but never returned to Canada, never was sworn in and never took his seat: he resigned not long after his appointment.

Robertson took the most active part in having the Court for Hesse provided with a lawyer-judge.

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28th, 1793, after which until its abolition, the Court was presided over by McDonell and Munro. This Court according to extant records sat at Cornwall, Osnabruck, Stormont and New Johnstown.[22]

In the next District, Mecklenburg, the commissions issued to Richard Cartwright, Neil McLean and James Clark, James Clark did not sit after July 8th, 1789, and Hector McLean took his place January 3rd, 1791,[23] and these three, i.e. Messrs. Cartwright and the two McLeans continued to preside over the Court until its abolition—often, however only two of them sat.

This Court sat at Kingston except on one occasion, January 14th and 15th, 1793, when it sat at Adolphustown and tried two cases.[24]

first member in the Legislative Assembly (1792) for the second Riding of Glengarry and the first Speaker of the House. Edward Jessup was born at Albany, was a Loyalist and fought on the loyal side during the Revolutionary wars: came to Canada and settled on land now in part occupied by the Town of Prescott: he became member of the Assembly for the second Parliament, 1796, representing the County of Grenville. In 1800, he became Clerk of the Peace for the District of Johnstown, and died at Prescott, 1815.

[22] New Johnstown was a settlement in the township of Cornwall, upon the River St. Lawrence, below the Long Sault; and was afterwards called Cornwall—the present name. The name New Johnstown still lingered and was for long used occasionally. The township of Osnabruck was above Cornwall, also on the St. Lawrence: it does not appear at what precise part of the township the Courts were held; Judge Pringle thinks probably it was near what is now Dickenson's Landing: Luneburg or the Old Eastern District, by J. F. Pringle, Cornwall, 1890, p. 47. I see no reason to doubt the accuracy of this identification.

[23] Richard Cartwright was born at Albany in 1759 and educated there: he took the Loyalist side during the Revolution and served two campaigns with Col. Butler, of the Queen's Rangers, as his Secretary. At the close of the war, having in the meantime come to Kingston, Canada, he joined the Honourable Robert Hamilton in business. The partnership dissolving, Hamilton went to Niagara, and Cartwright remained at Kingston. Cartwright was afterwards a member of the first Legislative Council of Upper Canada, and was most attentive to his duties as such. He was the grandfather of Sir Richard Cartwright, of the late Master in Chambers, and the present efficient Deputy Attorney-General.

Niel McLean and Hector McLean were prominent settlers of Scottish descent.

James Clark was afterwards one of the first members of the Law Society of Upper Canada, having been so fortunate as to be one of those receiving a license to practise, under the provisions of the Act of 1794. 34 George III., c. 4. It is said that a Commission as judge was offered to the Reverend John Stuart, but declined by him; and that Richard Cartwright was appointed in his stead: The Story of Old Kingston, by Miss Machar, p. 78.

[24] Kingston had been called Frontenac during the French regime: it rapidly assumed and continued to hold a position of great prominence in the St. Lawrence District.

Adolphustown was for some time of great relative importance, but has long lost its place in the advance of the rest of the province.

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In the District of Nassau, there was a curious mistake made. It had been intended to appoint Benjamin Pawling, Colonel John Butler and Robert Hamilton, judges of the Court, but Jesse Pawling's name was inserted in the Commission instead of Benjamin Pawling's—however this was speedily rectified, and on October 22nd, 1788, Jesse Pawling's Commission as judge was revoked (he being appointed a Coroner for the District), and Benjamin Pawling, Peter Tenbrook and Nathaniel Petit were added as judges to the two already appointed, Colonel Butler and Robert Hamilton.[25]

There is no record of the proceedings of this Court extant but no doubt it sat at Newark.[26]

[25] John Butler, the celebrated Coloner Butler of Butler's Rangers, was the son of Lieutenant Butler, a native of Ireland, who came to New York in 1711. The father accumulated a large estate by dealing with the Indians; he died in 1760. The son was born in New London, Connecticut, in 1728, he joined the British forces against France for the Conquest of Canada. He was present at Lake George (1755), Ticonderaga and Fort Frontenac: he also took a distinguished part in the siege of Fort Niagara by Sir William Johnson (1759): his great *forte* was the management of Indian troops—in 1778, he built the Butler's Barracks at Niagara on the Canadian side. He fought on the British side during the Revolution, and at its close came to Niagara, where he survived till 1796, dying after a life of service to the Crown.

Peter Tenbrook (should be Ten Broeck), also a resident of Niagara.

Nathaniel Petit (or Pettit) was recommended by Dorchester for appointment as Legislative Councillor, but failing this, he became member of the first Legislative Assembly for the Riding of Durham, York and first Lincoln; he was also a member of the Nassau Land Board. A farmer, he owned the land on which the Town of Grimsby stands.

Robert Hamilton was of Scottish extraction: a partner of Richard Cartwright on Carleton Island, near Kingston, on the dissolution of the partnership, he came to Niagara; he built at Queenston a large stone residence, a brewery and a warehouse, and was the most important personage commercially in that little community. He became a member of the Land Board for Nassau and also one of the first Legislative Councillors of Upper Canada. He and Cartwright generally saw eye to eye, but did not always agree with Simcoe, who did not hesitate, most unjustly, to call them Republicans.

Benjamin Pawling was a native of Pennsylvania, of Welsh descent, who served seven years in the Butler's Rangers. He had been a farmer, and in the close of the war, settled in Niagara. He was the first representative of the second Riding of Lincoln, in the Legislative Assembly, having then become a Colonel. Jesse Pawling was a brother of Benjamin's.

It is much to be desired that some one of local or family knowledge should write a full account of these pioneers, men of sterling character and loyalty above reproach, who did much to make our Queen Province what it is.

[26] Niagara-on-the-Lake was called Niagara, West Niagara, Loyaltown, Butlersburg, Nassau and Newark at different periods of its history.

WILLIAM RENWICK RIDDELL.

(To be continued.)

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A NOTE ON SOVEREIGNTY AND FEDERALISM.

Had he commented with any fullness upon it, the Constitution of the United States would doubtless have provoked the vehement derision of John Austin, for nowhere, either in theory or in practice, has it chosen to erect an instrument of sovereign power. In England, as De Lolme told us a century ago, nature alone has set limits to the omnicompetence of the King in Parliament, and what he so forcibly taught Professor Dicey has reiterated in the most famous of all his books. So that, in some sort, there would seem a theoretical deficiency in American government. We do not know who rules. Certainly the President is not absolute. Neither to Congress nor to the Supreme Court is unlimited power decreed. And, as if to make confusion worse confounded, there cut athwart this dubiousness certain sovereign rights possessed by the States alone.

Professor Dicey would shrug his shoulders and tell us that it is the natural consequence of federalism. It is, he writes, "the method by which federalism attempts to reconcile the apparently inconsistent claims of national sovereignty and State sovereignty." The sarcasm is but thinly veiled. The fathers reconciled these opposites by abolishing altogether any notion of Austinian sovereignty. Federal government, we are therefore told, is notoriously weak government, since in it there is no final arbiter. The legislature of the United States, or of Canada, for the matter of that, is degraded to the level of an English railway company. It is a non-sovereign law-making body. It derives its powers, like the Great Eastern Railway Company, from a written document, which simultaneously limits them. Federalism, Professor Dicey notes further, tends to produce Conservatism. For the Constitution is written and rigid. It acquires a kind of sacrosanct character in the eyes of the people. Change of any kind becomes difficult because it almost seems irreligious. It is condemned before it is attempted. The unitary method of government impresses Professor Dicey as being as far more admirable in conception as it is more efficacious in results.

Any criticism of this well-established doctrine has at least two obvious lines of attack. We might, in the first place,

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urge that to talk of parliamentary omnicompetence in such downright fashion is to beg the whole question. Theoretically existent, practically Parliamentary sovereignty is, in the technical sense, an absurdity. The British Parliament may be the legal superior of the colonial legislatures; but everyone is well aware that it dare not in fact override them on any fundamental question. When the South African Parliament forbade the admission of Indians to the Transvaal Great Britain felt that a grave injustice had been inflicted on a meritorious section of its subjects; but Great Britain did not dare, despite the theoretical sovereignty of its legislature, to repair the injustice so inflicted. When Lord Grey tried, in 1849-50, to turn the Cape of Good Hope into a penal colony, he was compelled, despite the delegation to him of sovereign power, to desist. Lord Brougham caused the Judicial Committee of the Privy Council to be created the Supreme tribunal in ecclesiastical cases; but it is notorious that churchmen have refused to accept its decisions as binding in spiritual matters. Sir James Graham, in 1843, took the legally admirable ground that if the Courts upheld the right of lay entry into patronage in the Scottish Church he must uphold their decision in Parliament; but that legal rectitude did not prevent Dr. Chalmers and his colleagues disrupting the Church to emphasize their dissent. In a more recent time, when the Welsh miners struck in complete defiance of the provisions of the Munitions Act, it was found simply impossible to enforce its penalties. The American Revolution was, on the English side, an experiment in applied Austinianism. It is surely obvious that a sovereignty so abstract is practically without utility.

The second method of approach is more constructive. It is the result of the view that sovereignty, rightly regarded, ought not to be defined as omnicompetence at all. Sovereignty is, in its exercise, an act of will, whether to do or to refrain from doing. It is an exercise of will behind which there is such power as to make the expectation of obedience reasonable. Now it does not seem valuable to urge that a certain group, the State, can theoretically secure obedience to all its acts, because we know that practically to be absurd. This granted, it is clear that the sovereignty of the State does not in reality differ from the power exercised by a church or a trade union. The obedience the church or trade union will secure depends simply on what

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measure of resistance the command inspires. So that, on this view, when Louis XIV. revoked the Edict of Nantes, when a church issues a new doctrinal order, when a trade union proclaims a strike, all are exercising a power that differs only in degree, not in kind, from that of the State. Analysed into its elements sovereignty is, after all, not such a very formidable thing. It is the obvious accompaniment of personality, and the main characteristic of personality is the power to will. Sometimes wills, whether individual or corporate, conflict, and only submission or trial of strength can decide which is superior. The force of a command from the State is not, therefore, bound to triumph, and no theory is of value which would make it so. When Germany orders its subjects to refrain from the discussion of peace terms it may enforce its rule when only Rosa Luxemburg or Liebnecht is concerned; it could not do so were the Socialists as a whole to rebel.

Aside from the historical accident which has given the constituent States of the American federation a certain sovereignty at any rate, in well-defined spheres, it may well be argued that Hamilton and his coadjutors would have had theoretical justification even if they had not had history to guide them in their determination of the division of constitutional powers. That division is more consonant with political facts than the unitary theory so favoured by the majority of European observers. Certain local groups have a life of their own that is not merely delegated to them by the State. They are capable of directing their own concerns. Their interest in themselves is revivified and inspired by the responsibility for such direction. When New York wants a new Constitution it can apply itself to that manufacture. When Australia needs one, or Canada, they must be made—the phrase is sinister—in Whitehall. The history of Lord Grey's experiments in the direction of colonial self-government makes clear the utter inadequacy of the latter method. If Wisconsin wants an income tax it can obtain one by winning the assent of its citizens. If Manchester wants a ship canal it must persuade Parliament that its needs are more important than the jealousies of Liverpool. There is no more tragic history than that which comes under the rubric 'the decline and fall of the parish.'

Lawyers, for the most part, have tended to believe that the status of a person is something it is in the power of the

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State alone to confer, and in this view Austin, doubtless, would have most fully concurred. But surely it is abundantly clear that the personality of associations is primary, that it springs from the fact of their existence, and is not conceded to them by the State. This concession theory has, it is true, the authority of great men like Savigny behind it. It was urged, in effect by that subtle lawyer Pope Innocent IV. when he argued that the corporate person is sheer fiction. That claim, however, is becoming increasingly impossible of acceptance. Things, for example, like the Disruption in the Church of Scotland, or the failure of the Privy Council as the supreme ecclesiastical tribunal, show that in truth the churches live lives of their own, independent and self-contained, and that they will not tolerate external interference. The State, for good and special reasons, withheld corporateness from trade unions; but the Taff Vale decision showed how real was its existence in despite of statute. The failure of the Sherman Act may be traced to a similar cause. You cannot make men compete by Act of Congress. They have wills of their own that the statute does not form. Everywhere we have diversity, plurality. It seems indeed time to admit its existence.

It is really difficult to understand what special merit attaches to unity. Germany points proudly to the complete absence of differences among her citizens. Contempt is openly expressed for a country like the United States where diversity of opinion is most clearly apparent. In Germany, it is moral error to doubt the rightness of her cause. It is certainly dangerous to resist the sovereign mandate to sacrifice all to her need. Yet there is clearly grave danger in her attitude. "The man," Lord Acton wrote, "who prefers his country before every other shows the same spirit as the man who surrenders every right to the State. They both deny that right is superior to authority."

In fact, there is real moral insufficiency in any theory of the State which impresses upon its members the need for any consistent uniformity of outlook. The fact that no one in Germany doubts her rightness in sinking, for example, the Lusitania, does not morally, or even politically, justify her position in that regard. It is simply evidence that in Germany to-day necessity has exacted the sacrifice of right to authority. Faith there is more urgent than thought. We

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prefer a country where the sovereignty is distributed, where the richness of the corporate lives is insurance against such sterility of outlook. The Austinian theory of sovereignty, ungenial enough even in its abstract presentation, would as a fact breed simple servility were it capable of practical application. There can be no servility in a State that divides its effective governance. The necessity of balancing interests, the need for combining opinions, results in a wealth of political thought such as no State where the real authority is single can attain. The price of liberty is exactly divergence of opinion on fundamental questions. The well-ordered and neatly-arranged products of recent German thought on politics testify to the existence of its opposite. No man, and even more, no State can ever be so right as not to need doubts of its rightness.

It is probable that even the most extreme supporters of Parliamentary authority would sympathise with this view. Certainly Professor Dicey adopted it when he gave his adhesion to the Ulster cause. For he thereby announced his willingness to resist the authority he had declared omnipotent, and he would surely not resist unless he had some hope of success. If the truth of this attitude be admitted, if the State be viewed, in brief, as something more than a delegator of powers, we begin to approach an organization that in essence is not distinct from a federation even if in name it be different. We begin to see the State as akin to that medieval empire which was above all a community of communities. The sovereign appears as a thing consistently to revere rather than as a thing undeviatingly to obey. It expresses a unity of feeling not a unity of opinion—the feeling that, as Aristotle pointed out long ago, the object of the State is the good life; while it implies a diversity of opinion as to the means by which that good life may be attained. Federal government may be weak government, but it is weak only as other governments are weak—that is, in the degree to which it commits acts of trespass. Parliamentary government has only remained strong, has only retained the appearance of omnicompetence, by reason of the delicate skill with which its footsteps have been directed.

A last word may be hazarded. One who comes to America from Europe may well crave leave to doubt whether, fundamentally, there is truth in the judgment that federal-

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ism is conservative. The forms, it is true, may be preserved, may even seem to be revered as sacred things, but the spirit glows with a life that is ever new and abundant. The one thing that must strike the modern observer of any federal Constitution is the growing impatience with its rigid encasement, the ever-insistent demand that the form shall be made equally elastic with the spirit. And in the variety of its group life, the wide distribution of its sovereign powers, he may not unjustly see the surest guarantee of its perennial youth.

H. J. LASKI.

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THE SHIELD OF THE CROWN.

The doctrine of *respondeat superior* whereby the principal is responsible for the wrongful acts of his servants, does not apply as between the Crown and its servants; or as between public officers of State and their subordinate officers for acts committed by the latter not directly ordered by the former in such a way as to make them their own acts: *Rogers* v. *Rajendro Dutt*[1]; *Raleigh* v. *Goschen*[2]; *Wright and Son* v. *Lethbridge*[3]; *Bainbridge* v. *Post Master-General.*[4] Agents or servants of the superior State power are, therefore, almost invariably personally responsible for their own acts only. This fact saves the doctrine of the immunity of the Crown, or of those who can be properly considered its agents in the strict sense, from civil liability for torts from the odium that might otherwise attach to it. The Sovereign being exempted from liability for torts in accordance with the maxim that the King can do no wrong, and not being responsible for the wrongful acts of public officers acting on his behalf even when such acts are ordered by him, as he cannot authorize a wrong, it would be a violent wrench of justice to make his agents also in every case personally irresponsible for wrongful acts committed by them as such. In *Rogers* v. *Rajendro Dutt*[5] it was said by Dr. Lushington delivering the judgment of their lordships on appeal that the civil irresponsibility of the supreme power for tortuous acts could not be maintained with any show of justice if its agents were not held personally responsible for them.

Where the party injured is the subject of a foreign State an exception exists as to the rule regarding the personal responsibility of the agent of the Crown. In that case if the injury be done by the authority of or ratified by the Crown there is no cause of action. This exception was recognized by the Court, per Cockburn, C.J., in the case of *Feather* v. *The Queen,*[6] where he said:—

> "As the Sovereign cannot authorize wrong to be done the authority of the Crown would afford no defence

[1] (1860) 13 Moo. 360.
[2] [1898] 1 Ch. 73.
[3] (1890) 63 L. T. 572.
[4] [1906] 1 K. B. 178.
[5] (1860) 13 Moo. 209.
[6] (1865) 6 B. & S. at p. 296.

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to an action brought for an illegal act committed by an officer of the Crown. The learned counsel for the suppliant rested part of his argument on the ground that there could be no remedy by action against an officer of State for an injury done by the authority of the Crown, but he altogether failed to make good that position. The case of Buron v. Denman,[7] which he cited in support of it, only shews that where an act injurious to a foreigner, and which might otherwise afford a ground for action, is done by a British subject, and the act is adopted by the Government of this country, it becomes the Act of the State, and the private right of action becomes merged in the international question which arises between our Government and the foreigner."

The difficulty of ascertaining in every case when and under what circumstances the exemption of liability due to the Sovereign properly applies arises from the difficulty of identifying the individual or corporation claiming it with that class of persons or officers whose duties make them the instrumentalities whereby the Sovereign acts in his public capacity for the public benefit.

It is obvious that with the modern development or extension of the means whereby the Crown or the State carries into effect its public purposes the number and variety of these instrumentalities have greatly multiplied. Even a partial enumeration of such agencies of the Crown in the execution of the public law of England will confirm this assertion. Commissioners of Woods and Forests, Commissioners of Excise, Secretaries of State, Lords of the Admiralty, War Department, Post-Master General, Lord Lieutenant of Ireland, the Board of Trade, Local Government Board, the Board of Agriculture, etc., may be classed as such agencies in their origin and functions. The mere fact that most of the functions of departments of Government are statutory does not, of course, sever their connection with the Crown so as to make them responsible for the acts of their agents or servants. The Departments themselves still retain their original purpose as channels by which the will of the Sovereign is carried into practical operation throughout his realm, and are therefore not responsible for the acts of their agents, being accountable personally for their own acts only.

[7] 2 Exch. 167, 188-9.

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A distinction is made between those public authorities and officers who are servants of the Crown or of the public and those who are such in the sense merely that they perform duties beneficial to the public. For example the Corporation of Trinity House and the Mersey Docks Trustees are not "servants of the Crown" although performing duties of a public character. They are therefore liable for the acts of their agents as any *juristic* person would be liable for the acts of his agent: *Gilbert* v. *Trinity House Corporation*[8]; *Mersey Docks Trustees* v. *Gibbs*[9]; *Mersey Docks Trustees* v. *Cameron et al.*[10] In *Gilbert* v. *The Corporation of Trinity House,* that corporation vested by the Merchants Shipping Act, 1854, with the management of light houses in England, and having powers for that purpose including the usual corporate powers of holding real estate, were held liable for negligence in the performance of their duties, as the Act did not constitute them servants of the Crown so as to exempt them from liability for the negligence of their agent in the performance of a duty within their corporate powers which they authorized him to perform. The fact that the Shipping Act of 1854 conferred new duties on the Corporation which in its inception was not such a corporation as could claim the exemption claimed by virtue of that Act, did not have the effect contended for by the defence. Mr. Justice Day, at p. 801, referring to it said:—

> "It is a corporation with very great powers vested in it by statute, but in no possible sense can it be deemed to represent the Crown. All the great officers of State are, if I may say so, emanations of the Crown. They are delegations by the Crown of its own authority to particular individuals. That is not the case with Trinity House, which has its nature and origin defined with sufficient clearness to enable us to say that at any rate it is in no sense an emanation from the Crown, nor in any way whatever a participant of any royal authority."

In *Mersey Docks Trustees* v. *Cameron et al.*[11] the plaintiffs sought to be exempted from being rated on the ground

[8] (1886) 17 Q. B. D. 795.
[9] (1866) L. R. 1 H. L. 93, at p. 111.
[10] 11 H. L. C. 443.
[11] (1864) 11 H. L. C. 443.

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that in the performance of their duties they were servants of the Crown. By the Statute 43 Eliz. c. 2, all property capable of beneficial occupation is liable to be rated for the benefit and support of the poor and impotent, though occupied by trustees under Act of Parliament for the maintenance of works beneficial to the public, though such trustees derive no benefit from the occupation, and though the benefits arising from such occupation are exclusively applied for the maintenance of the works. The Mersey Docks Trustees, having the management and control of certain docks, occupied property under such circumstances, and it was, therefore, sought to make them liable to the Act. It was held that as the Crown was not named in the statute, it was not bound by its enactments, but that the Mersey Docks Trustees having the control of the docks, etc., for the benefit of shipping frequenting the port of Liverpool and occupying them for the purpose of the Acts of Parliament by which they were constituted, and not using them in and for the service of the Crown exclusively, were rateable under the said Act. 43 Eliz., c. 2.

In *Mersey Docks Trustees* v. *Gibbs* [12] the same principle was applied. It was contended on behalf of the plaintiffs that by the general law of England they as a body of trustees incorporated for public purposes were not liable for damages sustained by others from the neglect of their servants or agents to perform the duties imposed on them as such corporation, and that their duty was limited to exercising due care in the choice of their servants or agents who alone were personally liable for such damages. Mr. Justice Blackburn at page 111 referring to this contention said:—

> "A great many cases were cited at your lordship's bar as supporting this position, many of which are really not applicable to such as the present. *Lane* v. *Cotton* [13] and *Whitfield* v. *Lord De Spencer* [14] (the cases of the Post-Master General), and *Nicholson* v. *Mounsey* [15] (the case of the captain of the man of war) are authorities that where a person is a public officer in the sense that he is a servant of the Government, and as such has the management of some branch of the Government business, he is not responsible for any negligence or default of

[12] (1866) L. R. 1 H. L. 93.
[13] Lord Raym. 646.
[14] 2 Cowp. 754.
[15] 15 East 384.

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those in the same employment as himself. But these cases were decided upon the ground that the Government was the principal and the defendant merely the servant. All that is decided by this class of cases is that the liability of a servant of the public is no greater than that of the servant of any other principal, though the recourse against the principal, the public, cannot be by action. But the defendants in the present action are not servants of the public in that sense."

In the case of *R.* v. *McCann* [16] affirming the judgment of the Queen's Bench, it was held that the Commissioners of Public Works and Buildings, a body corporate empowered to construct, among other works, a bridge at Chelsea, and authorized to take tolls to be applied for the expenses of the bridge, were not liable to be rated under 43 Eliz., c. 2, for the relief of the poor, as they were in occupation of the bridge as servants of the Crown deriving themselves no benefit from the receipt of the tolls, the circumstances being different from those existing in the case of the *Mersey Docks Trustees* v. *Cameron et al.*,[17] which led accordingly to the converse decision that the plaintiffs in that case could not claim the exemption claimed by them as servants or agents of the Crown.

The cases bringing into question the effect of statutes conferring corporate powers on corporations are, like all other cases in which persons claim the royal immunity, determined by the crucial question whether those claiming it are, in their origin and purpose, servants or agents of the Crown, although the claim by a corporation is generally, if not necessarily always, more involved. In the case of the *Sanitary Commissioners of Gibraltar* v. *Orfila* [18] Lord Watson delivering the judgment of their lordships said, p. 408:

"In considering the responsibilities which attach to the present appellants in the execution of their statutory duties, their lordships desire to keep in view the rule expressed by Lord Blackburn, and approved by the House of Lords in *Mersey Docks Case* [19] to the effect that in every case the liability of a body created by statute must

[16] (1868) L. R. 3 Q. B. 677.
[17] 11 H. L. C. 443.
[18] 15 App. Cas. 400.
[19] L. R. 1 H. L. 104.

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be determined upon a true interpretation of the statutes under which it is created."

In that case the action was to recover damages against the Sanitary Commissioners for injury to the respondents' property in consequence of the giving way of the retaining wall of an overhanging road, which the corporation was under a statutory duty to maintain as a road conservancy. It appeared that the result was due to original defects in the structure of the wall as to which the defendant corporation were not negligently ignorant, and not guilty of misfeasance, the injury arising merely from their nonfeasance. The distinction justifies the citation of another passage from the distinguished jurist Lord Watson who said, at pp. 411, 412:—

"Their lordships do not wish to suggest that Commissioners or other public trustees who have no pecuniary interest in the trust which they administer can escape liability when they are negligent in the active execution of the trust. It is an implied condition of statutory powers that, when exercised at all, they shall be executed with due care. But in the case of mere nonfeasance no claim for reparation will lie except at the instance of a person who can shew that the statute or ordinance under which they act imposed upon the Commissioners a duty towards himself which they negligently failed to perform. . . . Lord Blackburn in delivering the opinion of the consulted judges in *Mersey Docks* v. *Gibbs*[20] stated the proper canon of construction to be that 'in the absence of something to show a contrary intention, the legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities, as the general law would impose on a private person doing the same thing.'"

The case, of course, furnishes no exception to the rule that agents or servants of the Crown are not liable for the acts of their subordinates.

The cases of *Whitfield* v. *Lord De Spencer*[21]; *Kinloch* v. *Secretary of State for India*[22]; *Raleigh* v. *Goschen*[23]; *Bain-*

[20] L. R. 1 H. L. 93.
[21] (1778) 2 Cowp. 765.
[22] (1880) 15 Ch. D. 1.
[23] [1898] 1 Ch. 73.

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bridge v. *The Post-Master General*,[24] furnish instances of where the heads of Departments of State, which are but corporate Government agencies with powers and duties which originally were limited to private enterprise, are protected by the "shield of the Crown" to use an expression of Lord Cranworth in *Mersey Dock Trustees* v. *Cameron*.[25] In the case first in this list, *Whitfield* v. *Lord De Spencer*, an action in case was brought against the Post-Master-General for a bank note stolen by one of the sorters out of a letter delivered into the post office, it was held, per Lord Mansfield, that the action did not lie, although an action on the case lay without doubt against the party really offending. The position of the post-master was considered by him as being in no circumstance similar to that of the common carrier; but he is like all other public officers, such as the "Lord Commissioners of the Treasury, the Commissioners of the Customs and Excise, the Auditor of the Exchequer, &c., who were never thought liable for any negligence or misconduct of the inferior officers in their several departments."

In *Kinloch* v. *Secretary of State for India*, it was held that the defendant was merely the agent of the Sovereign to distribute certain booty of war among persons found to be entitled to a share of the same, himself being authorized to finally determine doubts unless Her Majesty should otherwise order, and that he was not liable to account to any of the parties found entitled. The defendant's accountability for the discharge of his duty was to Parliament and to the Sovereign.

In *Raleigh* v. *Goschen*, which was an action of trespass against the defendant and five other persons named in the writ and described as the Lords Commissioners of the Admiralty, and Major E. Raban, the Director-General of Naval Works, for the purpose of establishing that the Lords of the Admiralty were not entitled to enter upon certain property of the plaintiff or acquire it by way of compulsory purchase, for the purpose of erecting thereon a training college for naval cadets, and claiming damages and an injunction to restrain further trespass, it was held that the action against such an official body was misconceived and would not lie.

[24] [1906] 1 K. B. 178.
[25] 11 H. L. C. at p. 508.

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Romer, J., in stating principles applicable to the case said at p. 77:—

> "I think it is clear that the head of a Government Department is not liable for the neglect or torts of officials in the Department, unless it can be shown that the act complained of was substantially the act of the head himself, in which case he would be liable as an individual just as a stranger committing the same act would be."

On the same page he previously instances what would make the act complained of substantially the act of the head himself, by remarking that if the act had been committed by a subordinate officer of a Government Department of the Crown, by the order of a superior official, that Superior even if he were the head of the department in which the subordinate official was employed, could be sued.

In *Bainbridge* v. *The Post-Master General*[26] the same rule was followed, it being held in that case that the Post-Master-General is not liable in his official capacity, as head of a telegraph department of the Post Office for wrongful acts done by his subordinates in carrying on the business of the department.

In *Roper* v. *Public Works Commissioners*[27] it was argued that inasmuch as corporations can act only by their agents they are liable for the acts of their agents within the scope of their agency, but Shearman, J., held that the rule that servants of the Crown are not liable to be sued in their official capacity for torts committed by them is unaffected by the fact that they are incorporated, following the judgment of Collins, M.R., in *Bainbridge* v. *The Post-Master General*, who after carefully considering the authorities came to the conclusion that the presence or absence of incorporation made no difference to the proposition that the heads of Government departments are not responsible for the acts of subordinates.

Needless to say that the immunities or privileges enjoyed by the Crown and its Government officers in England are also enjoyed by the Crown and its Government agencies in the colonies so far as the same are not controlled or regulated by colonial statutes.

[26] [1906] 1 K. B. 178.
[27] [1915] 1 K. B. 45.

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As to contracts made by a public servant on behalf of the Crown the rule is that he is not personally liable: *Macbeath* v. *Haldimand*[28]; *Palmer* v. *Hutchison*[29]; *Dunn* v. *Macdonald*.[30] Chitty on Contracts, 16th ed., at p. 345, states the general rule to be that a public officer, acting on behalf of a known department of the State and in discharge of duties incident to his public employment is not liable personally upon contracts made by him in that capacity. Redress for breach of such contracts and damages therefor lies by petition of right the procedure in which is now regulated both in England and the colonies by statute.

[28] 1 T. R. 176.
[29] (1881) 6 App. Cas. 619.
[30] [1897] 1 Q. B. 555.

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MARRIAGE AND NATIONALITY.[1]

The present disastrous war has brought to the fore many questions connected with nationality; of these probably none is so full of interest and often so awkward in its consequences as, the now almost universal rule that (although marriage in no case affects the nationality of a man) a wife upon marriage takes the nationality of her husband. This rule has in many cases undoubtedly operated harshly where British women married to Germans have found the result to be that their husbands have been interned while they themselves have been subjected to the stringent regulations issued under the Defence of the Realm Acts and other British and Colonial laws affecting alien enemies. It is proposed in the following pages to give an account of British law on the effect of marriage on Nationality, premising it by saying that since both the Naturalization Act, 1870, and the British Nationality and Status of Aliens Act, 1914, are Imperial statutes, applying not only to the United Kingdom but also to all the Colonies, such subject is of as much interest to British subjects beyond the seas as to those born within the kingdom. Following this account, the law of the United States on the subject will be briefly noticed.

I.—British Law.

(*a*)—*Marriage.*—By the common law of England no person was a British subject except he or she were born on British soil, so that by old English law, which in this respect followed Roman law, marriage had no effect on the nationality of the wife, either to make a foreign woman English or an English woman foreign. An English woman could not put off her allegiance by becoming the wife of an alien, for *nemo potest exuere patriam* was a hard-and-fast rule. The common law on the subject is well expressed in the Countess of Conway's case[2] by Baron Parke when he says: "A French woman becomes in no way a British subject by marrying an Englishman; she continues an alien and is not entitled to dower": (see also Piggott, Nationality I., p. 57; Cockburn, Nationality, p. 11). This state of things continued until the year 1844 when by the Aliens Act of that

[1] Written specially for the *Canadian Law Times.*
[2] 2 Knapp 368.

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year (7 & 8 Vict., ch. 66, sec. 16) a partial alteration in the law was effected by the provision that any woman married to a natural-born British subject or person naturalized should be deemed to be herself naturalized and to have all the rights and privileges of a natural-born British subject. It will be remembered that at this time there was no means by which a British subject could expatriate himself by becoming naturalized in a foreign country, so that it is not extraordinary that the Act of 1844 contained no provision for the case of a woman (being a British subject) marrying an alien. Therefore her status remained governed by the common law and whatever may have been the effect of her marriage according to the law of her husband's 'state,' she did not lose her British nationality.

The Naturalization Act, 1870, entirely abrogated the common law rule and brought English law into line with that of most other countries which long before had ascribed to a wife the nationality of her husband. It was provided by sec. 10 that a married woman should be deemed to be a subject of the State of which her husband is for the time being a subject. It should be noted that this provision was only an extension of the rule first recognized by the Act that British subjects could by becoming naturalized in a foreign State shake off their British nationality and with it their allegiance; and the acquisition *ipso facto* by marriage of the husband's nationality by the wife is after all a species of naturalization. Prior to this enactment, the result of a British born woman marrying an alien by the law of whose State she acquired his nationality was to endow her with double nationality since she did not lose her British nationality.

The Naturalization Act of 1870 was repealed by the British Nationality and Status of Aliens Act, 1914, and sec. 10 of the latter Act (replacing sec. 10 of the Act of 1870) provides that 'the wife of a British subject shall be deemed to be a British subject, and the wife of an alien shall be deemed to be an alien.' There then follows a very important proviso and one which may be of great benefit to the wife; for under the Act of 1870 a wife not only took her husband's nationality at the time of marriage, but her nationality also could be changed by him after marriage simply by his changing his own. Her wishes could have been overruled. Now, however, sec. 10 provides that

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'where a man ceases during the continuance of his marriage to be a British subject, it shall be lawful for his wife to make a declaration that she desires to retain British nationality, and thereupon she shall be deemed to remain a British subject.' By this proviso, a British woman who marries a natural-born British subject who subsequently loses his British nationality either by becoming naturalized abroad (under sec. 13) or by making a declaration of alienage (under sec. 14), may prevent his change of nationality affecting her; and further a woman, whether British born or an alien, who has married a foreigner and is thus an alien in the eye of the law, but who has become a British subject on her husband's obtaining a certificate of naturalization, may still retain such British nationality even if her husband reacquires his status of an alien by becoming naturalized abroad or otherwise resuming his nationality of origin. If the wife does not take advantage of this proviso her nationality still varies with that of her husband and she ceases to be a British subject at the same moment as he does. It will be noticed that no provision is made to enable an alien woman marrying a British subject to retain her antenuptial nationality.

It will be noticed, also, that there is a most material difference between the provisions of the Act of 1870 and those of the present Act as to the national status of married women. Section 10 of the Act of 1870 merely declared that 'a married woman shall be deemed to be a subject of the State of which her husband is for the time being a subject': sec. 10 of the Act of 1914 declares that 'the wife of a British subject shall be deemed to be a British subject, and the wife of an alien shall be deemed to be an alien.' Further by sec. 27 (1) of the Act of 1914 'the expression 'alien' means a person who is not a British subject.' Now in the large majority of cases the effect of the two sections will undoubtedly be the same—the wife takes the husband's nationality. But let us take the case suggested by Hall of an alien who at the time of marriage has no nationality at all. This may happen in various ways. To take an illustration. The illegitimate child born in Germany of an English mother is actually destitute of nationality. He is not British, for he is born outside the King's Dominions; and no statutory provisions invest him with British nationality (cf. provisions of 4 Geo. 2, ch. 21, sec. 1; 13 Geo. 3, ch. 21; 4 & 5

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Geo. 5, sec. 1): neither does he acquire German nationality by German law. What is the position of a woman who is a British subject, and marries a person destitute of nationality? Now, as the husband is a subject of no State, she did not under the Act of 1870 acquire a new nationality on her marriage. As Hall points out (Foreign Jurisdiction, p. 50): 'A foreign marriage is in effect for a woman a form of naturalization in a foreign country, and it is simply because of the inconvenience of double nationality that a person naturalized abroad becomes an alien.' He adds that 'where no double nationality can exist, no object is served by depriving of her nationality, a person who is guilty of no wrong against the State.' Accordingly his view is (and it is difficult not to admit its truth) that a woman who married a foreigner of no nationality did under the Act of 1870 still retain her British nationality. But now look at the provisions of sec. 10 of the Act of 1914. Whatever doubt might have existed under the Act of 1870 no doubt is possible in the case of a woman who marries on or after January 1st, 1915, for 'the wife of an alien shall be deemed to be an alien,' and despite the fact that the foreigner may have no nationality he is certainly not a British subject and therefore is an alien. Consequently, the British woman who marries him herself becomes an alien and loses her British nationality. And even if we assume that Hall's view is the correct one as to the position under the Act of 1870, yet any British woman who by reason of her foreign husband being without nationality did under that Act retain her British nationality, would on the 1st of January, 1915, and by reason of the above provisions of sec. 1 of the Act of 1914, have lost her British nationality and have become an alien. The Civil Codes of most countries have provided against a loss of national status in such a case. Thus Art. 19 of the French Civil Code declares that 'a French woman who marries an alien follows the nationality of her husband, unless her marriage does not confer his nationality upon her, in which event she remains French.'

Another view advocated by Hall was that if a British woman should marry a native of a wholly uncivilized country she would in his opinion probably not lose her British nationality under the Act of 1870. Such a country, he argued, is not a State, the term State applying only to permanently established independent communities formed

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with political objects, possessing a definite political organization and guided by a sense of moral obligation towards other communities. This view—although apparently correct—might not have found favour with the Courts, who would perhaps not have put so narrow a construction on the word "State" used in sec. 10 (1) of the Act of 1870. However this may be, the view is certainly not applicable to the position under the Act of 1914 for the reasons given above in cases where the husband has no nationality.

When a British woman marries an alien, e.g. a Frenchman, then whether or not French law regards her as a French subject, she would 'be deemed to be' a French citizen by British law, by virtue of sec. 10 of the Act of 1914 (cf. Dicey: Conflict of Laws, p. 181).

The Act of 1870 was expressly made retrospective with regard to naturalization abroad, it being applicable to 'any British subject who has at any time before' it was passed become naturalized in a foreign State. It was no doubt intended also to be retrospective with regard to the effect of marriage, so that therefore a woman found at any time after the passing of the Act to be married to a foreigner would be a subject of the State to which her husband belonged, irrespective of the date of marriage. So that apparently by virtue of sec. 10 (1) of that Act an Englishwoman who, prior to the Act, had married a foreigner and would still be a British subject by the common law, became so soon as the Act came into operation, *ipso facto* possessed of her husband's nationality.

When a British woman marries a foreigner and the latter subsequently to the marriage loses his nationality, the woman apparently still in the eyes of British law retains her nationality in the husband's State.

A married woman cannot acquire an independent nationality from that of her husband (Act of 1914, sec. 10, and cf. Burge. Foreign and Colonial Law, II., p. 103); neither can she apply for a certificate of naturalization under sec. 2 of the Act of 1914 for by sec. 5 (3) 'a certificate of naturalization shall not be granted to any person under disability" and by sec. 27 (1) 'disability' means 'the status of being (*inter alia*) a married woman.' If by representing herself to be a *feme sole* a married woman obtained a certificate of naturalization, the certificate could be revoked under the new provisions of sec. 7. The pre-

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vailing view under the Act of 1870 was that she could not apply for a certificate of naturalization, and the matter is now put beyond question. The Committee of 1901 recommended that the question should be made quite clear. (Cf. Piggott: Nationality, I., 148). Again a married woman cannot divest herself of British nationality, for the secs. 13 and 14 of the Act which provide means by which persons may cease to be British subjects, expressly declare that such persons must not be under disability as above defined. Such further was the general opinion as to the position under the Act of 1870.

Since a British woman married to an alien is deemed to be an alien, she can be guilty of high treason only so long as she is resident within the King's Dominions. If the State to which she has thus become in the eyes of British law a subject is at war with the King, the woman is guilty of treason only if she assists that State in this country (cf. Halsbury: Laws of England, IX., p. 451).

(*b*)—*Death of Husband.*—So long as marriage had no effect on the wife's nationality it easily followed that the husband's death had also no effect. And even when under the Act of 1870 or the Act of 1914 marriage has operated to change his wife's nationality, the death of the husband is still without any immediate effect in this regard and the woman's nationality remains that of her husband at the time of his death until she takes some step to change it. The Act of 1870 was silent as to the status after her husband's death of an alien woman married to a British subject. It did declare [sec. 10 (2)] that a woman who was a natural-born British subject married to an alien and who had consequently herself become an alien remained an alien after her husband's death until she took the requisite steps to re-acquire British nationality, which under that Act were the same as those required of aliens in general, necessitating 5 years' residence in the United Kingdom. Some amount of argument may be based on this that since an express declaration was considered necessary, the provisions of sec. 10 (1) by themselves were not considered to permanently change the national character of the wife. On the whole, however, it seems that as the Act contained no clause expressly depriving a widow of the status of a naturalized British subject, an alien woman married to a British sub-

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ject did not under the Act lose her status on the husband's death. But the matter was not free from doubt, and it has been pointed out that if the widow lost her British nationality on the death of her husband, she would if she continued to reside in the United Kingdom have no nationality whatever, since the laws of most foreign States do not allow a female subject who has lost her national status by marriage to resume it unless she resides within their dominions (cf. Art. 9 of the Italian Code). The matter is now, however, governed by sec. 11 of the Act of 1914 wherein it is specifically provided that 'a woman who, having been a British subject, has by, or in consequence of, her marriage, become an alien, shall not by reason only of the death of her husband . . . cease to be an alien, and a woman who, having been an alien, has by, or in consequence of, her marriage become a British subject, shall not, by reason only of the death of her husband . . . cease to be a British subject.' It is further provided by sub-sec. 5 of sec. 2 that where a woman was a British subject previously to her marriage and her husband has died, the requirements of the Act as to residence shall not apply, so that such woman may apply for a certificate of naturalization immediately after the death of her alien husband, although the matrimonial home has been continuously abroad.

(*c*)—*Divorce.*—Since at common law, marriage did not affect the nationality of the wife, it follows that a decree of divorce could not. But what was the position after the Act of 1870 had imposed upon the woman on marriage the nationality of her husband? The general opinion, though expressed with some hesitation, was that as in the case of the husband's death, so here, the nationality acquired by the wife on marriage remained untouched on a decree of divorce, whether she became an alien or a British subject by the marriage (cf. Hall: Foreign Jurisdiction, p. 51). It should be observed that the Act of 1870 was silent on the point, and did not expressly declare a divorced woman to be "a statutory alien." 'In the case of a woman who was before marriage a British subject, it is not possible that she should by divorce have a larger privilege of resumption of British nationality than a widow:' (Piggott: Nationality I., p. 62). The Inter-departmental Committee appointed by the Home Office to consider the subject of naturalization, in their

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report (24th July, 1901), sec. 50, regarded it as probable that the woman's nationality remained unchanged after a decree of divorce but recommended that the position should be made clear. The point has now been definitely dealt with by sec. 11 of the Act of 1914 which declares that 'a woman who, having been a British subject, has by, or in consequence of, her marriage, become an alien, shall not, by reason only . . . of the dissolution of her marriage cease to be an alien, and a woman who, having been an alien, has by, or in consequence of, her marriage, become a British subject, shall not by reason only of the dissolution of her marriage, cease to be a British subject.' It is also provided by sub-sec. 5 of sec. 2 that in the case of a woman who was a British subject prior to her marriage and whose marriage has been dissolved, the requirement of the Act as to residence in the United Kingdom (or by virtue of sec. 8 of that part of the British Dominions concerned) prior to the grant of a certificate of naturalization shall not apply, so that such a woman may apply for a certificate of naturalization immediately after the dissolution of her marriage, even although the matrimonial life may have been passed abroad.

(*d*)—*Judicial Separation.*—A judicial separation will not affect the nationality of either party (Piggott: Nationality I., p. 63). For as Hall says (Foreign Jurisdiction, p. 51) 'foreign nationality is not a mere incident of marriage to be put on and off with it; it is a permanent alteration of status obtained by marriage but independent of marriage in its duration and results'; and since divorce does not affect nationality, *a fortiori* a decree such as that of judicial separation which does not dissolve the marriage, does not affect the nationality of either party. No mention is made of the subject in either of the Acts.

(*e*)—*Nullity of Marriage.*—The decree of nullity of marriage differs in its results both from a divorce and from a judicial separation, for it in effect declares that the purported marriage did not really exist. Since the declaration of nullity is retrospective in its effect the result of such a decree is to nullify the naturalization of the wife effected by the marriage, and to revive the former nationality of the wife if indeed it had ever been lost by the purported marriage (cf. Piggott: Nationality I., pp. 62 and 63). Until

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the nullity is judicially declared, however, the woman, if proceeded against by the putative husband, must be assumed to be vested with his nationality. If, on the other hand, the proceedings are instituted by the putative wife, it seems at least doubtful whether she has not the alternative right, as may be more to her advantage, of going upon the supposition that she retains her former nationality, or of availing herself of the assumption that the marriage is really valid until its invalidity is formally proved, and thus to go on acting as a person naturalized in the State of which her husband is a subject (cf. Hall: Foreign Jurisdiction, p. 44). The latter course appears to be the correct one. No mention is made of the subject in either of the Acts, unless it be argued, as it conceivably may, that the words in secs. 2 (5) and 11 which speak of dissolution of marriage and its effects, be construed also to cover cases of nullity of marriage. If such construction can be put on the words then the position of a woman (whether she be a British subject married to a foreigner or an alien married to a British subject) will, under the present Act, be the same as that indicated above with regard to the position of a woman whose marriage has been dissolved by a decree of divorce.

When a French woman's marriage is dissolved by the death of her husband or by divorce, she recovers her French nationality with the authorization of the Government, provided that she resides in France or returns declaring that she intends to remain there.

II.—United States Law.

And now let us look briefly at the law of the United States as to the effect of marriage on nationality or citizenship as we must now call it.

The general principle has always been that 'irrespective of the time or place of marriage or the residence of the parties any free white woman, not an alien enemy, married to a citizen of this country is to be taken and deemed a citizen of the United States' (Wharton. Int. Law Dig., Vol. II., p. 421). In 1855 Congress passed an Act providing that any woman who shall then or might thereafter be married to a citizen of the United States and who might herself be lawfully naturalized should be deemed a citizen (Rev. Stat. 1994).

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But although the United States have always looked favourably on the acquisition of United States citizenship by foreigners on marriage, there has not been the same readiness to allow a female American citizen to lose her native citizenship on her marriage with a foreigner. The question was considered by the Supreme Court so long ago as 1830 in a case which involved the question whether a native-born American woman had acquired British nationality by marrying a British officer, and it was decided that although marriage might affect her civil rights it did not affect her political rights or privileges, and that consequently the wife's native allegiance was not dissolved. The general doctrine was that no person could by any act of his own without the consent of the Government put off his allegiance and become an alien, and until 1907 the United States was one of the few countries where the nationality of native-born women did not merge on marriage in that of her husband. The position therefore prior to 1907 was that an alien woman marrying a citizen of the United States merged her nationality in that of her husband and she became a naturalized American citizen, but a native American woman marrying a foreigner remained a subject of her State, until she took some further step such as changing her residence to that of her husband's country and the adoption of such country as her own. Marriage was merely a fact to be considered with other facts as proving her desire to change her nationality. Marriage *plus* removal from the United States and voluntary change of permanent residence to her husband's country would be considered as a renunciation by a native-born American woman of her allegiance as a citizen of the United States. But under no circumstance could an American citizen become expatriated without actual voluntary removal out of the United States.

In *Pequignot* v. *Detroit* (16 Fed. Rep. 211) after quoting the Act mentioned above that an alien woman who married a citizen of the United States should be deemed to be a citizen of the United States, Judge Brown said that "since the right of expatriation has been so fully recognized and since the converse proposition that an alien woman by marriage with an American citizen becomes a citizen has been declared by statute, it appears that a woman's marriage with a foreigner should be regarded as an act of expatriation at least when accompanied with residence abroad."

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This new doctrine became embodied in a statute passed by Congress in 1907 (Act of 1907, ch. 25234, sec. 3), wherein it is declared that 'any American woman who marries a foreigner shall take the nationality of her husband,' which denationalizes an American woman *ipso facto* on marriage. This Act, so revolutionary in its nature and far-reaching in its scope, has come in for much hostile criticism, being branded as unconstitutional (since Congress has no power to take away the rights of citizenship), and as opposed to the solemn declaration of Congress in 1868 that the right of expatriation is a natural and inherent right of all people. But this criticism appears to be ill-founded for the woman on marriage performs a voluntary act which she knows will expatriate her, and it is difficult to appreciate the lament of those opponents of the measure who declare that it expatriates American women without their consent, and deprives them of their citizenship against their will.

Any American woman who has become an alien under the Act of 1907 may resume her American citizenship on the termination of the marriage (by the death of the husband or by a decree of divorce) by residing in the United States, or, though still residing abroad, by registering herself at an American Consulate within one year after the termination of the marriage.

By the law of the United States (which differs in this respect from British law) a married woman may be naturalized (1 Cra. C. C. 372) even without the concurrence of her husband (16 Wend. 617); and an alien woman becomes a citizen when her husband is naturalized even if she is not of age at the time (44 N. Y. Sup. Ct. 635), and though she may have lived in a foreign country for years and never have come to the United States until after his death (14 Op. Atty.-Gen. 402).

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CURRENT COMMENTARY UPON RECENT ENGLISH AND CANADIAN DECISIONS.

ENGLISH CASES.[1]

Power to wife to appoint by will during the continuance of the coverture. In re Safford's Settlement[2] seems worth a short notice, more on account of the ingenuity of the contention raised by counsel, than of any real difficulty in disposing of it. In 1854 a marriage settlement was executed under which, after the death of the survivor of the husband and wife, the settled trust funds, in the event of there being no issue of the marriage, were directed to be held upon trust for such persons as the wife should by will during the continuance of the said intended coverture direct or appoint' and in default of appointment upon trust as therein mentioned. There was no issue, and in 1896, the wife made a will purporting to dispose of all her property which she had power to appoint or dispose of by will. Her husband died in 1897, leaving her a widow, and she survived until 1914. The question was whether the wife's will was, under the circumstances, a good and valid appointment under the terms of the settlement. It was contended that the mere preparation and execution of a will during the coverture was not an appointment: *that there could be no appointment by will until the death of the appointor, and as she did not die during the coverture the power was not validly exercised.* Joyce, J., had little difficulty, however, in deciding that—

> "What she had done satisfies the requirements of the deed in reference to the manner in which the power is to be executed. There is no more to be said. There is no authority requiring me to supply or understand at all the additional condition that the testatrix shall not only make her will but also die during the coverture."

Will—Direct to "pay" money to children—Taking as joint tenants or as tenants in common. In *In re Clarkson,*

[1] The aim of the Editor is to make this feature of the C. L. T. a really complete and conscientious review of recent English decisions likely to be of use to Canadian lawyers, so that readers of it, from month to month, may rely on no important case escaping their notice.

[2] [1915] 2 Ch. 211, 84 L. J. (Ch.) 766.

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Public Trustee v. *Clarkson*[3] Eve, J., refused to follow the *dictum* of North, J., in *In re Atkinson*,[4] to the effect that if money is to "be paid" to several persons who take an absolute interest they must take as tenants in common. The testator had bequeathed leaseholds to trustees on trust to sell and pay the proceeds to and among his nephews and nieces as tenants in common, and directed that in case of the death of any of his nephews and nieces the children of the one dying should "be paid" the parent's share: Eve, J., held that the children took as joint tenants and not as tenants in common. He says—

> "A direct gift of a legacy or share of residue to A., B., and C. makes them joint tenants of the legacy or share, and the same result follows if the gift be to trustees upon trust for A., B., and C. In each case the testator's intentions can only be given effect to by payment, and yet in determining when payment can properly be made, the nature of the gift must, as it seems to me, be ascertained without reference to the fact that as it cannot be completed without payment, every such gift of necessity involves an implied direction to the executor or trustee to pay.[5] If this be so I cannot bring myself to hold that where the gift is in precisely the same terms it is to be differently construed in cases where the direction to pay is express and not implied. In other words, a bequest to A., B. & C. of a pecuniary legacy is in my opinion indistinguishable in these respects from one which takes the form of a direction to the executor to pay A., B. and C. the legacy. In each case A., B. and C. take as joint tenants."

Companies limited by guarantee—Liability of members to contribute an additional sum—Call of full amount on two members only. In *Lindley on Companies*, 6th ed., p. 578, it is said: 'The power of making a call must be exercised as a trust, so as not to oppress or favour one shareholder, or set of shareholders, more than another; and if a

[3] [1915] 2 Ch. 216.
[4] [1892] 3 Ch. 42, at p. 54.
[5] Presumably the learned judge means that if the gift is to be construed as a gift in joint tenancy, the time for payment would not be until the youngest joint tenant came of age. *Aliter* if the gift is to be construed as a gift to the beneficiaries as tenants in common. In that case, each would be entitled to be paid his or her share so soon as he or she attained full age.—Ed., C. L. T.

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call, which ought to be made on all the shareholders rateably, is made on some of them exclusively of the others, redress may be had.' *Galloway* v. *Hallé Concerts Society*[6] is an example of such redress being granted. The articles of association of a company limited by guarantee (as is permitted under the Companies Acts of British Columbia, Nova Scotia, and the Yukon), provided that each member should be liable to contribute and should when demanded pay to the committee any sum or sums not exceeding in the aggregate the sum of £100 (therein called the contribution) in addition to any liability in case of winding up under the guarantee clause in the memorandum, and that the committee might from time to time make such calls as they thought fit upon each member in respect of all moneys unpaid on his contribution, and that each member should pay the amount of every call so made upon him as appointed by that committee. In March, 1915, the committee passed a resolution calling up the entire uncalled balance of the contributions of two of the members only, the reason alleged being their refusal to pay the previous calls, and the trouble and expense thereby incurred and likely to be incurred by the company. The question was whether this was a sufficient reason. Sargant, J., held that it was not. He says (p. 239):—

> "Is it right to make this call on these two persons alone for this large amount merely because they have been dilatory in the payment of previous calls? It is said that expense is caused to the society by the necessity of enforcing these repeated calls against them and that less expense will be caused if the amounts can be called up in a lump sum. In my opinion that is not a sufficient reason. So far as legal expenses are concerned those legal expenses can be recovered in the ordinary way, and I cannot think that the mere fact that letters have been written to the plaintiffs before the matter was put in the solicitor's hands for the purpose of taking proceedings is a sufficient reason for the course which has been adopted. . . . It seems to me that the reason given by the committee of the society for making the calls on these two persons separately from any similar calls on the other members of the society is altogether insufficient."

[6] [1915] 2 Ch. 233, 84 L. J. (Ch.) 723.

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Soldier's will—Gift to an attesting witness. In re Limond, Limond v. *Cunliffe*[7] is a case which it is well to notice in these days. Sargant, J., decides in it that s. 15 of the Wills Act, 1837 (our R. S. O. 1914, c. 120, s. 17), which provides that devises and legacies to an attesting witness contained in a will shall be invalid, although the witness shall be admitted to prove the execution of the will, has no application to a soldier's will under s. 11 (our s. 14), which provides that any soldier being in actual military service may dispose of his personal estate as he might have done before the passing of the Act, that is to say, without any attestation at all. Consequently although the soldier's will before him was in fact attested by two witnesses, Sargant, J., held that a gift to one of these witnesses was valid. He says (p. 251):—

> "The governing consideration to my mind is that section 15 on the true general view of the statute deals with the execution and attestation of a will under the provisions of the statute itself and is not dealing with the subject-matter of soldiers' and sailors' wills, which in my opinion are left entirely unaffected in respect of execution and attestation by the provisions of the Act."

Compulsory purchase of land—Principles of valuation. In re South Eastern Railway Company and London County Councils' Contract[8] is a decision of the Court of Appeal that where an owner of two contiguous pieces of land forming an area suitable, and, it may be, best suited, for development and use as one building site, sells under compulsion a part of one piece as a part of that piece, and without any reference to his interest in the other piece, the purchase price for the land so contracted to be sold must be ascertained without reference to the vendor's interest in the other piece, and is not to be ascertained by deducting the value of what is left to the owner of the two pieces after the sale from their aggregate value immediately prior to the sale. The compulsory notice to treat had been superseded by a contract between the parties, the purchase price to be fixed by arbitration. The arbitrator awarded £18,330 by way of purchase-money, and in so doing expressly stated that in arriving at that sum he had had regard

[7] [1915] 2 Ch. 240.
[8] [1915] 2 Ch. 252, 84 L. J. (Ch.) 756.

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solely to the value of the estate and interest in the land contracted to be sold, but that if the true measure of the purchase-money were the difference between the two pieces of property before the giving of the notice and aggregate value of the said lands after the taking of the part which had been taken, he found that the purchase-money should be £3,465. The vendors brought action for specific performance of the agreement, and recovered the whole £18,330. Eve, J., the trial judge, found, and the Court of Appeal agreed with him, that on its true construction the contract was for the sale and purchase of part of the vendors' property known as Nos. 9 and 10 Strand, and nothing beyond; and that it was not a contract for the sale and purchase of a part of the entire site. Cozens-Hardy, M.R., says, p. 261:—

> "It seems to me it would be altogether unreasonable to say that there is any analogy between a case like this and a case where you are dealing with a small strip in front of one property, one house—to say that that has any relation whatever to a case like the present, where as a matter of fact it so happens that the vendor has a considerable stretch of property at the rear which may be benefitted by the widening of the Strand and the new frontage which he will get. We are asked to say that there is a difference to be made in the purchase-money of part of Nos. 9 and 10 Strand by reason of the fact that it is really part of a larger property owned by the vendors. I am entirely unable to agree to that. I cannot follow that argument at all."

Contract required to be in writing—Subsequent parol agreement. *Williams* v. *Moss' Empires, Limited*[9] is a decision of a Divisional Court which is of interest, not only on account of the point decided, but also because it clears away a certain confusion of thought which is apt to exist when we speak of "varying a contract." Both points clearly appear from the extract we are about to make from the judgment of Sankey, J.; but it is right first to state what the case was about. By a contract in writing which was not to be performed within a year from its making, the plaintiff was engaged by the defendants to perform at their theatres on certain terms, including the payment of a salary at a specified rate. During the currency of the contract, *and*

[9] [1915] 3 K. B. 242.

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within less than a year of its termination the parties *verbally* agreed to a variation of the salary for the remainder of the term. Subsequently, however, the plaintiff brought this action to recover salary earned since the verbal agreement, at the rate specified in the original contract. The Divisional Court held that he was not entitled to succeed. At pp. 247-8, Sankey, J., says:—

> "I think some confusion has arisen from the use of the words 'variation of a contract.' The result of varying the terms of an existing contract is to produce, not the original contract with a variation, but a new and different contract. The rule of law applicable to the question arising in this case may, in my opinion, be stated as follows: A contract which in compliance with the Statute of Frauds is in writing may be rescinded by a new agreement. The new agreement may be one which in order to be enforceable is required to be in writing, or it may be one which is valid though it is not in writing. If it is one which is required to be in writing, and is not in writing, it is unenforceable and cannot be treated as evidence that the original contract has been rescinded, and the original contract, therefore, remains in force. But if the new agreement is in writing, or, if verbal, is one which need not be in writing, the new agreement is valid and the original contract is rescinded. In the present case the new agreement was verbal; its terms did not require it to be in writing; and, therefore, it rescinded the original contract."

Insurance Fire—Assessment of loss by the auditor of the insured. Recker & Co. v. *North British and Mercantile Insurance Co.*[10] is a decision of a Divisional Court that where a policy of fire insurance provides that the amount of all losses under the policy should be *assessed* by the auditor of the insured, the assessment of the auditor is conclusive evidence upon a subsequent arbitration of the amount of the loss recoverable under the policy unless it be shown that the auditor has misdirected himself in point of law, or has omitted to take into consideration some material fact; and that the auditor may be cross-examined, and the insurance company may call direct evidence, to show that the auditor has omitted to take into consideration material facts, but not to show that his conclusions of fact were erroneous.

[10] [1915] 3 K. B. 277.

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Libel—Justification—Acts occurring after date of libel. In our last issue (p. 853) a decision of the Court of Criminal Appeal in England in the notorious bride-drowning case as to the admissibility of evidence of subsequent acts of the prisoner was referred to. *Maisel* v. *Financial Times, Limited*[11] is a decision of the Court of Appeal that in a civil action of libel on character and reputation, where justification was pleaded, evidence of facts which occurred within a reasonable time after the publication of the libel, and went to show the existence a fraudulent tendency on the part of the plaintiff, as alleged in the libel complained of, was admissible. The libel stated that the plaintiff 'was likely to misappropriate funds of companies with which he was connected.' The following extract from the judgment of Lord Cozens-Hardy, M.R., suffices for a complete understanding of the case:—

> "Speaking generally, in an ordinary case of libel, as was put by Phillimore, L.J., in this very case,[12] if you say of a man, 'He stole a hatchet on such and such a day,' you must justify that particular allegation, and that is all: it is not relevant to say that he stole a hatchet the day before, or stole a hatchet the day after. But when you get an allegation such as I find here, it seems to me that different considerations apply. . . . In a general allegation by way of justification of general character and general tendency, which are the only words I can think of at the moment as the meaning of the word 'likely,' I do not see how you can exclude events which happen, I will not say years after, but within a reasonable time from the date of the publication. I instance a case which seems to me to be rather analogous; an allegation that the plaintiff was addicted to drink and would be drunk if he could. Could you exclude evidence that the day after publication of that libel he had been found suffering from delirium tremens? It seems to me you could not in answer to a general allegation of what the man was likely to have done if he could. Of course the acts in question raised by the amendment may be altogether too distant in point of time from the publication of the alleged libel. I do not in the least suggest that they are not, but the allegations in the particulars relate to acts of a similar kind within some two or three months from the publication of the

[11] [1915] 3 K. B. 336.
[12] 31 Times L. R. 192.

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alleged libel. Having regard for the financial nature of these transactions I do not think it possible to say that they were too remote to be allowed to be evidence of what a man was likely to have done at the date of the publication."

CANADIAN CASES.[1]

Effect of listing a property on a real estate agent's books. *Peacock* v. *Wilkinson*[2] calls for notice on account of certain *dicta* of Duff, J.'s—which in fact seem only *obiter dicta* in view of the circumstances, but are treated in the head-note as *res decisæ*. At p. 333, the learned judge says:

"One point ought to be noted at the outset and that is that the mere listing of property, as it is called, with a real estate agent does not itself involve the grant of any authority to him to enter into a binding contract of sale on behalf of the vendor. When sales are made in the course of a "land boom" it perhaps most frequently happens that the seller who lists his property with the real estate agent has a title resting upon one or more, sometimes upon a long series, of executory agreements and it is of the greatest importance that the conditions of any contract of sale should be so drawn as to protect him fully, and this, without special instructions, the agent is, of course, not competent to do. Some confusion, no doubt, has arisen from the use of the term "real estate agent" which describes, of course, not the legal relation between the two parties, but merely the nature of the so-called agent's occupation. The mere listing of property with such an agent implies nothing more than a representation that the proprietor is prepared to do business upon those terms and is not in itself an offer to sell which may be accepted and converted into a binding agreement by any purchaser saying to the agent that he will take the property on those terms. The agent's business is to procure a purchaser, that is to say, to bring into contact with the vendor a person willing to purchase on the terms mentioned. Having done that he has performed his function and earned his commission, provided his authority is not in the meantime

[1] As most of our subscribers have ready access to the Canadian reports, it is not deemed necessary to review the current Canadian cases in the same detail as the English. Only those which seem of special interest and importance will, therefore, be referred to.—Ed., C. L. T.

[2] 51 S. C. R. 319.

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revoked by the sale of the property by the proprietor. The listing alone gives him no authority to bind the proprietor by a contract of sale."

Company—Sale of business premises—Contract not under seal. Many years ago Bovill, C.J., said in South of Ireland Colliery Co. v. Waddle[3]:—

"Originally all contracts by corporations were required to be under seal. From time to time certain exceptions were introduced, but these for a long time had reference only to matters of trifling importance and frequent occurrence, such as the hiring of servants, and the like. But, in progress of time as new descriptions of corporations came into existence, the Courts came to consider whether these exceptions ought not to be extended in the case of corporations created for trading and other purposes. At first there was considerable conflict; and it is impossible to reconcile all the decisions on the subject. But it seems to me that the exceptions created by the recent cases are now too firmly established to be questioned by the earlier decisions which, if inconsistent with them, must I think be held not to be law. These exceptions apply to all contracts by trading corporations entered into for the purposes for which they are incorporated. A company can only carry on business by agents—managers and others; and if the contracts made by these persons are contracts which relate to objects and purposes of the company, and are not inconsistent with the rules and regulations which govern their acts, they are valid and binding upon the company, though not under seal. It has been urged that the exceptions to the general rule are still limited to matters of frequent occurrence and small importance. The authorities, however, do not sustain that argument."

The contract in that case was for the purchase of machinery required for the company's undertaking. These *dicta* of Bovill, C.J., were, however, cited in the recent case of *McKnight Construction Co.* v. *Vansickler*,[4] and applied to the case of a contract by a company for the sale of unsuitable business premises in order to enable the company to acquire premises more commodious and better adapted for its purposes. The contract was held valid although not under the company's seal.

[3] L. R. 3 C. P. 463, 469.
[4] 51 S. C. R. 374.

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Constitutional law—Succession duty. In re Muir Estate[5] it seems sufficient to say that the Court (Davies, J., dissenting) held that a debt due to the deceased, who had his domicile in Manitoba at the time of his death, under a contract, which he had carried out to build elevators in Saskatchewan,—and debts under *implied* covenants for payment in agreements of sale under which he had sold certain lands which he had owned in Saskatchewan,—constituted property within Manitoba and were liable for succession duty in Manitoba. Four of the judges also held that the duties imposed by the Manitoba Succession Duties Act are direct taxation and the legislation imposing them *intra vires* of the provincial legislature.

Constitutional law—Roman Catholic Separate Schools. The following passage in the judgment of Meredith, C.J.O., in which the other judges of the Appellate Division concurred, in *Mackell* v. *Ottawa Separate School Trustees*,[6] in which an Ontario Act respecting Roman Catholic Separate Schools was held *intra vires*—may well be called special attention to. He says (at p. 341):—

> "I am unable to find anything which supports the contention that the right to use the French language in the Separate Schools of the Province was guaranteed by treaty or otherwise to the French-speaking people, nor am I able to appreciate the contention that that is a natural right pertaining to them which the legislature is powerless to impair or destroy. However, even if it had been shewn that by the terms of the treaty which resulted in the cession of Quebec to Great Britain, this right had been guaranteed to the French-speaking people of the ceded territory, the new Constitution for Canada which was provided by the British North America Act would have abrogated those rights except in so far, if at all, as they are granted by it. The British North America Act was the result of long deliberation and careful consideration by representatives of the various provinces which were by it united into one Dominion, and great care was taken to provide for preserving the rights which religious minorities then possessed in matters relating to education. The use of the French language was also a question considered and dealt with;

[5] 51 S. C. R. 428.
[6] 34 O. L. R. 335.

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and by sec. 133, the right was given to use that language in the debates of the Houses of Parliament of Canada and of the Houses of the legislature of Quebec, and by any person or in any pleading or process in or issuing from any Court of Canada established under 'this Act and in or from all or any of the Courts of Quebec.' It is inconceivable to me that the framers of the resolutions on which the Act was based would have embodied in them these provisions if they had any idea that the French-speaking people already enjoyed the greater rights which, according to the contention of the appellants' counsel they possessed."

Public right of navigation in Canadian non-tidal waters. *Fort George Lumber Co.* v. *Grand Trunk Pacific Railway*[1] is an important decision of Clement, J., in British Columbia upholding a public right of navigation in non-tidal waters in Canada. The action was brought for damages caused to the plaintiff company by the acts of the railway company in obstructing the navigation of the Upper Fraser River during the construction of their railway bridge over the river in the immediate vicinity of Prince George above the plaintiff company's mill, between it and its sources of supply. The learned judge gave judgment for the plaintiff, and over-ruled the contention of the railway company that there exists no right in the public to navigate the waters admittedly and manifestly non-tidal of the Upper Fraser. He describes the question as one of the greatest importance "about which much legal literature has been written without, I think, any decision which in strict law binds this Court." The learned judge says (p. 311):—

"As to navigation the rule of the common law was clear; it would seem, that in the case of non-tidal waters there was no paramount right in the public to use them for purposes of navigation or as highways for travel and transportation. . . . There is, however, a strong current of authority in Canadian cases that the rule of the common law of England denying the existence of a public right of navigation in non-tidal waters is not the law of Canada even in those provinces which have adopted the common law of England as the basis of their jurisprudence. The authorities are all collected in the elaborate judgment of Mr. Justice Anglin in the

[1] 32 W. L. R. 309.

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Kenora case.[8] It has been considered that either *jure naturæ* or by a species of dedication by the Crown evidenced by throwing open the colonies for settlement, a public right, paramount to the title of any private grantee of the Crown, if not the Crown's title itself, has always existed to make such use as was possible of the natural waterways, non-tidal as well as tidal, as a mean of travel and transportation; in other words, that such waterways are public highways. . . . I hold that the Fraser River in its upper waters is a common and public highway, taking judicial notice of the fact that, apart from recent and unchallenged user by steamboats and for the floating of logs, it had been from the earliest days of the colony a well-known highway for the traders of the Hudson's Bay Company and for early explorers. . . . It seems to me that the case is governed by the principle laid down in reference to the binding effect upon the Crown of the inducements held out in the proclamation which followed upon the treaty of Paris in 1763, and laid down by Lord Mansfield in the celebrated case of *Campbell* v. *Hall*.[9] The Crown's invitation to all and sundry to "resort" to the British Colonies in North America carried with it, I think, that without which the bread offered would have proved a stone, namely, the free use of the waterways as the only available highways for exploration and settlement; and, after settlement, for travel and transportation. And the conduct of the early governors was uniformly along the same line of invitation to come up and possess the land."

It may be noted that, at p. 310, Clement, J., observes, incidentally, that there is apparently little doubt that the Dominion parliament cannot create a public right of navigation over provincial Crown lands covered by water where no public right of navigation now exists. But, with respect, it is submitted that if, as the Privy Council decided in *Attorney-General of British Columbia* v. *Canadian Pacific R. W. Co.*,[10] the Dominion parliament has power to dispose of provincial Crown lands for the purposes of a Dominion railway by virtue of its legislative jurisdiction in relation to railways extending beyond the limits of a province, it would have just as much right to create a public right of navigation over provincial Crown lands by virtue of its legislative

[8] 13 O. L. R. 237.
[9] Cowp. 204.
[10] [1906] A. C. 204.

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jurisdiction over navigation and shipping, as it has, by admission of the learned judge himself, to establish, as against private persons, as public highways of navigation, such waterways as it sees fit.

Claim against several tort-feasors—Recovery of judgment against one. In *Black* v. *Dominion Fire-proofing Co.*[11] the judges of the Manitoba Court of Appeal seem to have gone out of their way to hold that if a man has a claim or rather claims, for the same cause of action against two or more persons severally, and brings actions and recovers judgment against one of them, this judgment, even before satisfaction, will bar a subsequent action against the others. We say "gone out of their way" to hold this, because from the facts as stated in the report it appears that the prior judgment had not only been recovered but satisfied, which, we confess, we would have supposed, made all the difference. We had supposed before this decision, and perhaps some of our readers were under the same impression, that, although in the case of a joint liability, obtaining judgment, even without satisfaction, against one extinguished the liability of the others,—this was not the case with a several liability on the part of two or more: that one cannot recover compensation twice for the same cause of action, but that, unless the liability was joint, the mere recovery of judgment, without satisfaction, did not bar a subsequent action against others; and that this was the difference between a correal and a solidary obligation. No judgment directly in point seems to be cited in the judgments, but Cameron, J.A., cites words of Baron Parke in *King* v. *Hoare*,[12] and, although he admits that that was a case of joint liability, considers the *dicta* wide enough to cover the case of several liability of two or more. He says (pp. 436-7):—

> "It is true that Baron Parke had before him the case of a joint liability, but his exposition of the law goes further, it seems to me. In conclusion he thus significantly states the judgment of the Court "that, where judgment has been obtained for a debt as well as a tort, the right given by the record merges the inferior remedy by action for the same debts or torts against another party,"—which expression of opinion is wide enough to

[11] 25 Man. 426.
[12] 13 M. & W. 493.

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include actions for tort by a plaintiff against defendants who are not necessarily joint tort feasors, but are liable for the same cause of action. Whether they be joint or several, the tort being the same, the inferior remedy by action has become merged in the right given by the record of the judgment already entered, and has, therefore, ceased to exist."

Partnership—Sale of share. *Marwick* v. *Kerr*[13] is a decision of the Quebec Court of King's Bench, that all the assets of a firm, being the common property of the partnership, and its goodwill being an asset of the firm, a partner cannot legally sell a share of its total business without the consent of his co-partners, and without accounting therefor to the firm.

[13] Que. 24 K. B. 321.

A. H. F. L.

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SUPREME COURT OF CANADA.

QUE.] [JUNE 24TH, 1915.

LARRAU v. POIRIER.

Present:—SIR CHARLES FITZPATRICK, C.J., and IDINGTON, DUFF, ANGLIN and BRODEUR, JJ.

Sale of land—Contract—Deferred payment—Omission of date for payment—Completion of contract—Acceptance by purchaser —New term—Instruments of title—Delivery—Acts 1025, 1235, 1491-1494, 1533. 1534 C. C.

A contract for the sale of land, in the Province of Quebec, by which the date of the deferred payment of an instalment of the price is not fixed is, nevertheless, according to the law of that province a completed contract of which specific performance may be enforced.

(DUFF and BRODEUR, J.J., dissented.)

In his letter accepting the offer of sale, the purchaser requested the vendor to send the documents of title and certified abstract of the registrar of deeds affecting the property to his notary.

Held, per FITZPATRICK, C.J., and ANGLIN, J., that, by this request, it was not intended to stipulate a new term to the contract.

Per BRODEUR, J.—Although the vendor is obliged to furnish the purchaser with the documents of title, including the registrar's certified abstract, yet as, in the present case, it appeared that the vendor made it a condition that the titles and certificate were not to be delivered into the possession of the purchaser the request in the letter of acceptance was a stipulation of a new term which left the contract incomplete. *La Banque Ville Marie* v. *Kent* (Q. R. 22 S. C. 162), and *Sauvé* v. *Picard* (20 Rev. de Jur. 142), referred to.

Judgment appealed from (Q. R. 23 K. B. 495) affirmed.

Appeal dismissed with costs.

St. Germain, K.C., and *C. A. Archambault*, for appellant.

St. Jacques, for respondent.

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CONTEMPORARY LEGAL REVIEWS AND PERIODICALS.[1]

The *Law Times* of September 18th has the following interesting paragraph:—

'The communication of a strictly informal and non-committal character from the Pope, through the medium of Cardinal Gibbons to President Wilson, in reference to a basis for peace proposals or possible mediation between the contending Powers, will recall the aspiration of the Pope in the days of the Holy Roman Empire, which rested upon the magnificent notion of a vast universal Christian monarchy, to be an international judge or mediator. Out of the conditions engendered by insurrections, civil war, race hatred, and the jealousies and ambitions of Sovereigns in perpetual strife with each other, arose the longing then as now for some acknowledged system of international law, and for some supreme tribunal that could so administer it as to settle all contentions without bloodshed. The Pope, in the struggle with the Emperor, aimed at the establishment of his supremacy over all Princes, including the Emperor himself, so as to enable him to offer to the world the arbitrating power it demanded. The Pope's influence for good as an arbitrator between States has been the subject of the glowing eulogism of John Stuart Mill. On the other hand, an attempt was made to make the Emperor international judge or mediator, but the theory of the Emperor's political and legal supremacy never ripened into reality. The Peace of Westphalia (1648) was a formal abrogation of the theory of the Holy Roman Empire, which, despite many failures, assumed to provide a complete system of international justice and a supreme tribunal adequate for the settlement of all controversies which could possibly arise between Christian nations. "That peace," writes a well-known publicist, "set the seal on the disintegration of the 'World Empire' at once of Pope and Emperor, and made possible the complete realisation of the doctrine of Grotius, the doctrine of the sovereignty of States. The Peace of Westphalia did not create international law, but it made a true

[1] It is by no means the intention of the C. L. T. to make this monthly feature a mere jumble of extracts. Our numerous exchanges from all over the Empire and from the United States are carefully examined as they come in, and attention called to whatever seems most striking and important in them.—Ed., C. L. T.

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science of international law realisable:" (Walker's Science of International Law, p. 57). The effort of the Pope, as the successor in office of Pontiffs who before the Reformation had aimed at assuming the position of international judges of a United Christendom, a conception shattered by the Reformation and nullified by the Peace of Westphalia, to secure a peace through mediation or arbitration, is a striking illustration of the cardinal defects in the system of international morality on which Mr. Asquith laid stress in his speech in Dublin on September 25th, 1914—the absence of an authoritative tribunal, whose decisions would be irresistible, to deliver, expound, and enforce its rules.'

The *Law Journal* (English) for September 25th comments upon the judgment of the Admiralty Court in the *Case of Kim and other vessels*[2] as follows:—

'The Kim judgment undoubtedly marks a fresh development of the doctrine of continuous voyage in its relation to contraband trading. It was alleged for the claimant that under the existing application of the doctrine neutral cargoes of conditional contraband could not be condemned when taken on the way to a neutral port unless there was evidence in the papers that there was to be a further transport to the enemy territory, and also that knowledge of the further transport must be brought home to the neutral consignors. If, it was said, the goods were to be taken into the stock of the neutral country to which they were immediately consigned they were not liable to condemnation, though it was probable that the purchaser would forward them to the enemy. The President of the Prize Court, however, would not admit this argument, and he found authority both in English and American prize decisions for condemning cargoes on their way to neutral countries when the surrounding circumstances pointed unmistakeably to an intention to make them available for the enemy. In the decisions about colonial trade, where the doctrine of continuous voyage originated, it was pointed out (e.g. in *The William* [1798]) that a colourable importation into a neutral country of the prohibited goods would not prevent condemnation; and later, in the American Civil War, the American Prize Court condemned many British

[2] The *Law Times* for the same date publishes the judgment *in extenso*.

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cargoes on their way to neutral ports in the Bermudas and Mexico because the trade in munitions between these ports and the enemy territory was notorious. The novel development is the application of these principles to conditional contraband. . . . The circumstances of the war have shown that a further enemy destination may be as justly inferred for conditional as for absolute contraband. Further, the absorption of a large proportion of the whole population in the military and auxiliary services of the State justifies in many cases the treatment of destination to enemy territory as destination to the enemy government. When a third of the population is being rationed by the State, cargoes of provisions obviously making their way to the enemy country are properly condemned as contraband, though their port of consignment is innocent.'

The *Law Notes* (New York) for October, 1915, makes reference to a subject which not long ago was beginning to attract considerable attention in Toronto, namely the power of judges to suspend sentences. It states that the Department of Justice at Washington proposes to settle once for all, at least so far as the federal judges are concerned, the vexed question as to the extent of the power of judges in this respect; and that the attorney-general recently issued a circular to all United States attorneys to resist the suspension of sentences in all criminal cases. It appears that the Supreme Court has been asked to grant a writ of mandamus compelling a certain District Court judge to make and enter the order requiring the issuance of commitment and the enforcement of the execution of sentence in a certain case. A case of *United States* v. *Wilson*[3] is cited in which a Circuit Court, after stating that the District Court had suspended a sentence "for such uncertain time as the defendant should continue to remain so favourably impressed with the laws of the land as to obey them," held that instead of being a mere suspension of sentence "it operated as a condonation of the offence, and an exercise of the pardoning power, which was never conferred upon the Court." In conclusion the writer says:—

'The exercise of the right doubtless had its origin in the peculiar hardships resulting from the enforcement of the rigid rules of criminal procedure, where the discre-

[3] 46 Fed. 748.

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tion now resting in the Courts to grant new trials was unknown, and it was not possible to carry the case to a higher Court for a review of the facts.[4] Lord Hale in 2 Hale P. C. c. 58, p. 412, described the right of a Court to suspend sentences as follows: "Sometimes the judge reprieves before judgment, as where he is not satisfied with the verdict, or the evidence is uncertain, or the indictment insufficient, or doubtful whether within clergy[5]; also when favourable or extenuating circumstances appear, and where youths are convicted of their first offence. And these arbitrary reprieves may be granted or taken off by the justices of gaol-delivery, although their sessions be adjourned or finished, and this by reason of common usage." . . . Many of the States have recognized the good that may be done by the careful and intelligent exercise of such a power and have passed statutes providing when and in what manner it may be used, and this perhaps is the best solution of the question.'

The *Law Journal* (English) for October 2nd, *à propos* of the question concerning the liability of tenants to make good the damage done to their premises by hostile aircraft, contains the following apt citation from Pepys' Diary under date November 5th, 1666, when it was being alleged that Papists had endeavoured in several places to increase the Great Fire:—

'To my Lord Crewe's, and there dined, and mightily made of. . . . My Lord Crewe was discoursing at table how the judges have determined in the case whether the landlords or the tenants, who are, in their leases, all of them generally tied to maintain and uphold their houses, shall bear the loss of the fire; and they say that tenants should, against all casualties of fire, beginning either in their own or in their neighbour's premises; but, where it is done by an enemy, they are not to do it. And this was done by an enemy, there having been one convicted and hanged upon this very score. This is an excellent salvo for the tenants, and for which I am glad, because of my father's house.'

[4] This is not the case in Canada now, although the clauses of the Criminal Code (secs. 1021, 1022) permitting, under certain circumstances, a new trial on the facts, and apart from any case reserved on a question of law, have been seldom taken advantage of.—Ed., C. L. T.

[5] Meaning, of course, within benefit of clergy.—Ed. C. L. T.

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The *Law Journal,* however, adds the timely admonition:

> 'We hope that no admirer of the gaiest of gossips will be induced to regard him as a legal authority. It may be taken as settled that a lessee who has covenanted to keep his house in repair, and to deliver it up in that condition at the expiration of the term, is not relieved of his liability because the house has been damaged by the King's enemies.'

The Solicitors' Journal and Weekly Reporter for September 18th in an Article on *The Whole Duty of an Ambassador* makes the following reference to Dr. Dumba, and Count Bernstorff's actions in the United States. Speaking of the general nature of an ambassador's duty to the sovereign State whose guest he is, it says:—

> 'It is his duty to refrain from interfering in the affairs of the host-State—just as a private guest is not supposed to take sides in, indeed must ignore the existence of, disputes in the family of his host. Put conversely, it is his duty to restrict his activities to the immediate amenities of his own existence and the performance of his recognized mission to his host. That mission is threefold. He must act as a negotiator when differences arise between the States. He must protect the interests of his own nationals. He must observe the economic, military, naval, and political situation of the host country, with a view to avoiding possible future collisions between them. This last right is not exactly that of a guest in the house of a private host, but it is well recognized in International law (Stockton, at p. 205). Indeed, it is generally held to justify the practice of espionage in the host's military affairs; the naval and military attachés of an embassy have a recognized right to receive and pay for confidential reports by spies. But here the right, in any case an invidious one, stops abruptly. The envoy must not step outside his duty of "observation" and practise any interference in the affairs, industrial or otherwise, of the State which receives him. Emphatically, if his State is at war with a third party, he must not use the territory of the neutral, to whose sovereign he is accredited, as a base of military or naval operations, direct or indirect, against the belligerents. It is because Count Bernstorff is alleged to have habitually overstepped these limits that he is in peril of being told by President Wilson and Secretary of

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State Lansing that to them he is no longer a *persona grata;* and it is because Dr. Dumba actually did so that he is leaving America.'

Dulce est desipere in loco, and we think this is the place to introduce a story which appears in the *Central Law Journal* for October 1st, and apparently originated in the *London Tribune*:—

One summer a well-known solicitor went with his family to a small seaside resort on the east coast, and boarded with a farmer who was in the habit of taking boarders. The next year he wrote to the farmer, and in his letter said: "There are several small matters that I desire changed should I decide to pass my holidays at your house. We don't like the maid Mary; moreover we do not think a sty so near the house is sanitary." The farmer replied: "Mary is went, and we 'aven't 'ad no 'ogs since you went away last August."

We have received the *Law Notes* (London, England) for October; and although we have no space for extracts we must say that our bright little contemporary is in our opinion the very best English legal periodical which law students here, or anywhere else, can subscribe for. The *De Minimis* paragraphs, the *Interviews with Clients,* the *Practical Conveyancing Questions,* and *the Chats with a Young Solicitor* are all excellent.

We notice in the *Central Law Journal* for October 8th, a long Article by Mr. Anson H. Bigelow on the very important subject of *The Relation of Directors of a Corporation to Individual Stockholders.* After reviewing the American decisions and text-books, the writer says:—

'From the above summary it is very apparent that the law on the question under discussion is in a decidedly unsettled state. The conflict in decisions seems irreconcilable. On the one hand, in those jurisdictions which see no duty to the shareholders as individuals there would seem a general disposition to base their views upon the lack of technical trust relationship. The inherently abstract idea of an artificial personality in the modern idea of a corporation, seems to form the ground of all this difficulty. Courts refuse to see a technical trustee in a director of a corporation. From the fact that the legal title to corporate property is not vested in the

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directors but is in the corporation itself. The difficulty lies then in the legal conception of an artificial person; but it should not be forgotten that this abstraction is a creation of the Courts for their convenience, and has in fact no actual existence. . . . If the superior knowledge of a director growing out of his official opportunities are to be used in an attempt by himself, or together with a few associates, to crowd out the small stockholder by a manipulation of the affairs of the company, *the corporation of the future will soon go into decline as a means of organizing the resources of the many for the accomplishment of great ends.* . . . To continue such organizations and to make possible such aggregation of capital, the law should be clear and well defined, and should adequately protect each individual investor; and it would seem that much could be done in accomplishing this protection if the trust relation were fully and definitely established between each individual stockholder and the managing directors.'

The English *Law Times* of October 16th does us the compliment of reproducing *in extenso* the Article on the *Locality of a Chose in Action* which appeared in our issue for September.

The *University of Pennsylvania Law Review* for October contains a very elaborate Article covering fifty pages, by Mr. P. Tecumseh Sherman on, what he terms, *The Jurisprudence of the Workmen's Compensation Laws.* He confines his attention to the laws of France, Great Britain, Germany and Austria, and we can best indicate his mode of treatment by his own words:—

'The line of discussion in the following pages starts with the objections to the former law of employer's liability, passes first to the various juridical theories of responsibility proposed as the basis for a substitute, next to an analysis of the principles of the four compensation laws selected as typical, then to the economic and sociological theories more or less associated with those laws, and finally concludes with the principal objections to them. Early in the discussion will be presented the principles of the juridical theory of responsibility for "trade risk"; and thereafter the points for consideration will be how far those principles really underlie the compensation laws and how far they are sound and expedient.'

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The same number contains, also, a long Article by Mr. Layton B. Register on *The Basis of the Property Right in Trademarks in Brazil.*

The Solicitors Journal and Weekly Reporter for October 16th in an Article on *Liability for Spread of Fire,* discusses the question—How far is a man who lights a fire on his own land liable for damage done by the fire spreading to his neighbour's land? We extract the following which gives the gist of it.

> 'With respect to the common law the better opinion seems to be that the liability for spread of a fire lighted on one's own premises was absolute and did not depend on negligence. In an old case in the Year Books—*Beaulieu* v. *Fingham* (2 Hen. IV., 18, pl. 5)—the custom of the realm is thus stated: *Secundum legem et consuetudinem regni nostri Angliæ . . . quilibet de eodem regno ignem suum salvo et secure custodiat, et custodire teneatur, ne per ignem suum damnum aliquod vicinis suis ullo modo eveniat.* A statute of Anne dealt with this question, and finally came the Fires Protection (Metropolis) Act, 1774 (14 Geo. III., c. 78), which, by section 86, enacted that no action should be brought against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall . . . accidentally begin, nor shall any recompense be made by such person for any damage suffered thereby.' This enactment has been held not to apply to cases where a fire has been intentionally lighted and has then spread to a neighbour's land: *Filliter* v. *Phippard.*[6] Where, therefore, an ordinary occupier of land has himself (or by his servants or agents) lighted the fire, the question whether his liability for damage done to his neighbour is absolute, or qualified by the necessity for proving negligence, must still be governed by the rules of the common law, and by decided cases, independently of statute law. . . . In *Filliter* v. *Phippard, supra,* it was also held that section 86 of the Act of 1774 does not apply where a fire is caused by negligence, and the plaintiff in that case recovered by reason of negligence on the part of the defendant's servants in lighting and managing the fire. There appears to be no modern case of authority in the English reports, deciding that a man who lights a fire on his own land is liable absolutely to

[redacted] Q. B. 347.

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his neighbour for damage done, by the spreading of the fire to the latter's land, independently of negligence. There are cases to the contrary in the American reports, and negligence is, in the United States, held to be the gist of the cause of action. The English text books also are divided on the subject. . . . The divergence in the views of the text writers is reflected in the cases on the subject that are to be found in the Colonial reports. Support can be found in these reports for each view. Under these circumstances the English practitioner may usefully peruse the latest of these oversea cases,[7] in which the Supreme Court of South Australia has expressly decided that the rule of English law now is that the person who lights a fire on his own land does so at his own peril, and must answer for the consequences unless he can shew something extrinsic analogous to *vis major*. Thus the position adopted in Clerk and Lindsell's Torts (6th ed., p. 470) is upheld against the view that negligence constitutes the gist of the action for damage.'

The *Juridical Review* for October has an interesting sketch of *Lord Coke as a Person*, by Mr. Francis Watt. The writer narrates some of the notable incidents in his life, and amongst others his notorious conduct as Crown prosecutor at the trial of Sir Walter Raleigh.

> 'Says Raleigh, "I will wash my hands of the indictment and die a true man to the king." To which Coke rejoins, "You are the absolutest traitor that ever was." And again, "All that Lord Cobham did was by thy instigation, thou Viper; for I *thou* thee, thou Traitor:"'

And so on. We commend the Article, but in lieu of further citations from it, feel more disposed to quote the late Professor Maitland's vigorous picture[8]:—

> 'The common law took flesh in the person of Edward Coke. With an enthusiastic love of English tradition, for the sake of which many offences may be forgiven him, he ranged over nearly the whole field of law, commenting, reporting, arguing, deciding, disorderly, pedantic, masterful, an incarnate national dogmatism, tenacious of continuous life.'

[7] *Young* v. *Tilley* [1913] S. A. R. 87.
[8] Article on English Law: Encyc. Britan., Vol. 28 (1902 ed.).

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The same issue contains another excellent historical Article by Mr. William Roughhead entitled *The Toll of the Speedy Return* describing the circumstances attending the trial, in 1704, of the officers and crew of the British ship *Worcester* for alleged piratical seizure of the *Speedy Return*, a ship of the Darien company, including an account of the causes of the hostility of the Scotch aroused by England's treatment of the Darien company, and of the daring capture of the Worcester before the trial by a body of Scotchmen under the leadership apparently of the secretary of that company: also the subsequent execution of the captain, mate, and gunner of the Worcester at the behest of an angry mob. A well written and interesting story! There is no denying that the *Juridical Review* takes the palm among legal periodicals for literary ability. The number also contains amongst other Articles, one on the *Law of Negligence, and its application to children*, by Mr. J. G. Hamilton-Grierson, and one on *The Limitation of Liability under contracts*, by Mr. J. L. Collinson. Mr. Hamilton-Grierson sums up the conclusions at which he arrives in the following way:—

> 'In dealing with cases of reparation for accidents to children the following points must be kept in view: whether the child was a trespasser, a licensee, or rightfully in the place where the injury was received; whether the danger was known or unknown, hidden or obvious; whether the cause of the injury was a thing dangerous in itself or harmless until tampered with; whether a special duty towards children existed, or whether only reasonable precautions for the safety of the public in general were necessary, it always being remembered that where a question of contributory negligence arises it must be treated, both as regards the actual capacity of the child and the physical act to which blame is attached, as a matter of fact, and not as a matter of law.'

We notice in the October number of the *Scottish Law Review* in its excellent *Notes from London* the following reference to Mr. Justice Ridley, who, it will be remembered, has been criticised lately for some alleged unbecoming exhibitions of temper on the Bench:—

> 'It is now stated that a member of the House of Commons has received a considerable amount of support for a motion which he wishes to make respecting the

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action of the judge, with a view to the House of Commons passing a resolution desiring the judge's removal. The newspapers say that this member has obtained so many names that the Government has felt obliged to grant a day for the discussion of the motion.'

The *Illinois Law Review* for October contains a valuable Article of Mr. John B. Winslow, Chief Justice of the Superior Court of Wisconsin, under the strange caption '*The Courts and the Paper Mills.*' It appears that a friend calling at the chambers of Mr. Justice Pinney, then a member of that Court, found the judge surrounded by a small fortification of law-books, hard at work on an opinion. Stopping a moment in the doorway and taking in the situation, he said, with a quizzical gleam of the eye,—"Pinney. I'd rather be a dog and chew rags for a papermill than have your job." Chief Justice Winslow uses this phrase as a text to a Article upon the ever increasing burden upon lawyers in the constantly growing number of reported cases. In the course of it the learned writer formulates certain rules which we respectfully commend to the notice of the judges, and which he suggests would have an appreciable effect upon the output of written judgments without militating against the systematic preservation and following of precedent, the value of which he says it would be foolish to underestimate:—

'1. No opinion should ever be written upon an affirmance where only questions of fact are involved. In such cases an affirmance means that the findings of fact are sustained by the evidence and an opinion really says nothing more.

2. No opinion should be written upon an affirmance where the case is determined by following a legal principle or principles well established by previous decisions in the same court.

3. No opinion should be written upon affirmance upon a mere question of practice or procedure unless, in the judgment of the Court, the question be one of such importance in the administration of the law that it should be settled by an authoritative pronouncement from the Court of last resort.

4. In cases of affirmance generally no opinion should be written unless in the judgment of the Court the question is of such exceptional importance as to demand treatment in an opinion.

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As a large majority of the decisions of Courts of last resort are affirmances it seems quite apparent that careful application of these four rules would make a very considerable reduction in the number of opinions written.

If it be objected that subdivision four is too vague and indefinite to be of any value, I have to admit that the efficiency of this subdivision will depend entirely on the personal views of the judges administering it. In my own opinion, the principles which should be applied in determining whether the question is "of such exceptional importance as to demand treatment" are substantially as follows: A question demands treatment if it is necessary in deciding it to (a) construe a provision of constitutional or statutory law or modify a previous construction thereof; (b) announce a new or modify an existing principle of law or settle a question on which the authorities in the jurisdiction conflict; (3) deter mine a question of such general importance to the public at large as to make its authoritative settlement as apparent public duty.

In cases of reversal it is clear that there must generally be an opinion written. This is especially true where there must be a new trial or further proceedings taken in the trial Court. In cases of reversal on questions of fact, however, an opinion is only needed for the information of the parties or the trial Court and is absolutely valueless as a precedent. In all such cases it seems that it would be well to prohibit its publication in the reports. I confess that the question of how such an opinion can be kept away from the pernicious activity of private reporting systems is a very difficult one.'

The same issue contains an Article by Mr. Roscoe Pound, professor of law in Harvard University, entitled *Regulation of judicial procedure by Rules of Court* in which he explains the operation of this method, in places where it has been adopted, and expounds the reasons which lead most students of procedure to prefer it, and discusses the objections urged against it.

The *American Law Review* for September-October has a long and really learned Article under the curious title—*'The cunning livery,'* by Mr. Wm. H. Field, in which the development in English law of remedies for loss sustained through fraud of the defendant is traced. There are also Articles on *Copyright in Canada*, by Mr. Herbert A. Howell,

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of Washington, D.C., and on *Executive Legislature and Judiciary in pardon* by Mr. James D. Barnett, of the University of Oregon, amongst others is this number.

We have also received *The Insurance Law Journal* (New York) for October, the *New Jersey Law Journal* for October, *Bench and Bar* (New York) for September, *Case and Comment* (Rochester, N.Y.) for October, and our exchanges from British India.

NEW BOOKS AND NEW EDITIONS.

***The Criminal Code of Canada* and *The Canada Evidence Act*, as amended to date, with Commentaries, Annotations, Forms, etc., etc., by James Crankshaw, B.C.I., K.C., of Montreal; 4th ed.: Carswell Co., Ltd., Toronto: 1915. PP. 1531. Net price: Ordinary paper, $15; thin paper, $17.**

Mr. James Crankshaw's *Criminal Code of Canada* scarcely needs any commendation at our hands. It has for long been generally acknowledged by the profession to be the best work on the subject. The present edition, which is beautifully printed on thin Indian paper, contains all the amendments and additions to the Criminal Code, made in and since 1910, including those of the recent *Criminal Code Amendment Act*, 1915. Mr. Crankshaw has been assisted in its production by his son, Mr. James Crankshaw, junior, barrister-at-law. In the Appendix the following Dominion Statutes are printed with annotations: The Imperial Criminal Evidence Act; the Imperial Criminal Appeal Act, 1907; the Imperial Foreign Enlistment Act; the Canadian Adulteration Act; the Dairy Industry Act; the Meat and Canned Foods Act; the Alien Labour Act; the Lord's Day Act; the Money Lenders Act; the Identification of Criminals Act; the Ticket of Leave Act; the Fugitive Offenders Act; the Extradition Act; the Gold and Silver Marking Act and the Yukon Act, so far as it relates to criminal matters: also the Extradition Conventions with the United States, and a list of Great Britain's other Extradition Treaties. We can heartily commend this new edition of Mr. Crankshaw's book to the profession throughout Canada.

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The Modern Lawsuit: Some of its Steps: A Message to the Profession, by a Barrister of Osgoode Hall: Carswell Company, Ltd., Toronto; Sweet and Maxwell, Limited, London. 1915: 202 pp. Net price, $1.

This little book takes us for a pleasant ramble through the past and present fields of legal procedure. As the title indicates, it is intended not so much as a practical guide to the practitioner, as it is as a message to the profession. As the author says in his preface:

"As is well known the Victorian era opened upon the old system with its absurd technicalities and fictions and forms, and closing left the law and its procedure under the new system whose methods, though some degrees below perfect, are founded on common sense and better fitted to promote justice and a popular sense of fair play among litigants . . . The philosophy of *The Modern Lawsuit* is that a stagnant system of jurisprudence, like any other stagnant system, is a failure. Its moral is to teach the need of still further law reform to the end that law procedure shall be simplified and levelled to the average intelligence, that whatever unwarranted cost and delay and fiction and technicality survive in the law suit of to-day shall be still further pruned and cut down to the limit of good sense and equal rights to all."

Again the author says (p. 21):

"The plan of this treatise is not, of course, to invite the profession's attention to each and every step of either a criminal case or a civil cause; but rather to consider certain of the most striking features finding their place under the old practice as distinct from the incidents of the modern trial."

Most lawyers we think will find pleasure and profit in turning over the pages of this little book. We cannot, however, accede to all the author's theories. For example we don't think the last word of modern research connects our jury with wager of law, and the compurgators, as seems to be done at p. 22; but derives it from the Frankish inquest, through the *jurata*: nor do we think that the object of the *peine forte et dure* was to extract a confession, as is suggested at p. 29, but simply to compel the accused to put himself on the country. The *jurata* as distinguished from trial under one of the regular *assizes* of inquest, having originated in the consent of the parties, the idea prevailed that no one could be tried by a jury without his consent. But trial by battle

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never lay against the Crown, and after the abolition of the ordeals, there was no way of trying a man accused of a crime, on the presentment of a grand jury, except by a petty jury. Hence the *peine forte et dure.*

Latin for Lawyers, containing (I.) A course in Latin, with legal maxims and phrases as a basis of instruction; (II.) A collection of over one thousand Latin maxims, with English translations, explanatory notes, and cross-references; and (III.) a vocabulary of the Latin words: Sweet and Maxwell, Limited, London, Eng.; The Carswell Co., Ltd., Toronto: 1915: Pp. 300. Net price, $2.

The old complaint used to be that schools and Universities turned out scholars, after many years and much expense, with little Latin and no Greek? Now that so many institutions of so-called higher learning turn out men with no real knowledge even of Latin, this book is likely to find a ready welcome among the legal fraternity. Law is almost, if not quite, the only field of practical work, in which Latin still finds a habitat, and no action of ejectment will ever succeed in quite evicting it.

Crustula Juris, being a collection of leading cases on contract done into verse by Mary E. Fletcher and Bernard Wallace Russell, with a preface by Humphrey Mellish, K.C., and introduction by Mr. Justice Russell: The Carswell Co., Ltd., Toronto. Net price, $1.

We can most heartily recommend this little book, not only to all students-at-law, and to all students of law, but also to the public at large on account of its object. It appears that the whole of the author's and publishers' profits are to be given in aid of the children rescued from the ruins of Ypres, and other Flemish towns. No charity could be more appealing, but in truth there will be no charity on the part of those who buy it, for they will get their full money's worth. The authors are following in the footsteps of no less a legal luminary than Sir Frederick Pollock in thus combining rhyme with reason. The legal accuracy throughout is as remarkable as the cleverness of the versification. A real knowledge of many important points of case law can be obtained from the careful study of it. We set out on its perusal in the hope that we could pick out the best thing in the book, but find it impossible where all are so good. We therefore

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select the following for quotation merely because it is one of the shortest:

Matthews v. Baxter, L. R. 8 Ex. 132.

John Barleycorn deserves attention,
That monster of the Deil's invention,
So unremittingly bombarded;
In contracts how he is regarded?

Bill Baxter once upon "a time"
Got "stewed" far worse than he intended,
Bill's spirits feeling all sublime,
His bank account seemed some distended.

Now, all his life one vain ambition,
Held Bill, that grew with every "skate on,"
And itched and chafed like all perdition,
To take a piece of real estate on.

And on this last most merry spree
Bill's brains got into such a ruction,
They took him off in merry glee
To bid some in at Matthew's auction.

He sobered, still with his desire,
And found the booze had gratified it,
And since the fat was in the fire,
Went right down town and ratified it.

We need not say what came to pass,
When Bill had not a cent for spending,
Suffice, they sued the silly ass,
And he, poor fool, began defending.

Bill pleaded that as he was drunk
When buying, he had bought insanely,
And as of liquor he had stunk,
That Matthews must have known it plainly.

About as good as most defences,
If that described the whole transaction,
For when one acts without his senses
The contract's open to retraction.

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But there were other facts to add,
As plaintiff showed in his reply,
The contract was no longer bad
Since Bill had gone to ratify.

The outcome of the case destroyed
A notion that had once prevailed,
That contracts made when drunk were void.
In other words, Defendant failed.

The judgment isn't long to read,
The views expressed are not surprising,
We only note the case indeed,
Because the subject's appetizing.

B. W. R.

The American Journal of International Law: **A Quarterly: Volume 9: No. 3, July, 1915.**

The latest issue of this very handsome *Journal of International Law,* besides much valuable editorial comment, reports of judicial decisions involving questions of international law, and book reviews, contains the following Articles: *The Doctrine of Continuous Voyages in the XVIIIth Century,* by Harmodio Arias; *Some Questions of International Law in the European War,* by James W. Garner; *The Doctrine of Servitudes in International Law,* by Pitman B. Potter, and *International Law as applied by England in the War: The Treatment of Alien Enemies,* by Norman Bentwich.

We have also received:—

The Board of Railway Commissioners for Canada: Judgments, Orders, Regulations, and Rulings: Vol. 5, September 28th, 1915: Printed under the authority of the Board by the Simmons Printing Company, Ltd., Ottawa, from whom reprints of any judgments or orders required in quantities of 250 and up may be obtained.

A Right of the States: **An address delivered by Alfred P. Thom, of Washington, D.C., before the State Bar Association of Tennessee on June 25th, 1915, at Chattanooga.**

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Mr. Thom asks and answers the question: Is it not a right of each State that Congress alone, which represents all, shall be the exclusive arbiter of what is right and just in interstate and foreign trade, and that no State shall be permitted to advance itself at the expense, and to the disadvantage of the others, perchance by its narrowness, its greed, and its selfishness in trade?

Year Book of the Carnegie Endowment for International Peace for 1915: Published, 2 Jackson Place, Washington, D.C.

As may be supposed, the Report of the Director of the Division of International Law has special interest at the present time.

Eighth Report of the Registrar of Boards of Conciliation and Investigation of proceedings under the Industrial Disputes Investigation Act, 1907, for the fiscal year ending March 31st, 1915 (being an Appendix to the Annual Report of the Department of Labour for the same period): printed by order of Parliament: King's Printer, Ottawa.

THE GAZETTES.

The *Canada Gazette* for Octr. 2nd, contains an Order in Council of Septr. 25th, 1915, providing that—Until six months after the termination of the present war and the final declaration of peace in so far as the British Empire is concerned, all grants of cancelled mining rights made under the provisions of any of the Mining Regulations shall be subject to the rights of persons accepted for military service, under the prior Order in Council of Octr. 28th, 1914, to hold such mining rights free from the risk of cancellation owing to failure to comply with any of the requirements of the said regulations.

In the same issue is an Order in Council of Septr. 20th, 1915, declaring the meaning of certain provisions in the

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Order in Council of May 8th, 1915, respecting the relief which may be granted to a homesteader who is a member of a military force.

The *Canada Gazette* of Octr. 9th, contains an Order in Council of Septr. 30th, amending the Regulations governing the payment of fishing bounties.

The *Canada Gazette* of Octr. 23rd, contains a Proclamation proroguing the Dominion parliament until December 6th, next.

The *Ontario Gazette* of Octr. 16th, contains the Resolution of the Board of License Commissioners for Ontario, passed on Octr. 13th, last, that—'Notwithstanding any statutory provision to the contrary, no liquor shall be sold in any licensed tavern in this province upon any day of the week after the hour of eight o'clock in the afternoon, but this Resolution shall not be construed to interfere with the statutory provision respecting the hour of closing on Saturday.'

The *Manitoba Gazette* of Octr. 9th, contains an Order in Council proroguing the legislature until Novr. 18th.

The bulky *Saskatchewan Gazettes* for Septr. are mainly filled with advertisements of sales of lands for arrears of taxes.

The *Saskatchewan Gazette* for Octr. 15th, contains a Proclamation of Octr. 12th, last, for the protection of the property and interests held *bonâ fide* in their own right by persons who have joined or may at any time hereafter join as volunteers the forces raised by the Government of Canada on account of the war, or who have left or may hereafter leave Canada to join the allied armies, either as volunteers or reservists.

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LOCAL AND PERSONAL.

Mr. Robert Wetmore Hannington (Harris, Bull, Hannington, and Mason) of Vancouver, has been appointed city solicitor for Victoria, B.C., *vice* Mr. Thomas R. Robertson resigned.

Mr. Justice Tellier, of the Superior Court, Montreal, has resigned.

Mr. L. T. Marechal, K.C., of Montreal, has been appointed a judge of the Superior Court.

Mr. John King, K.C., for twenty-three years a lecturer in the Osgoode Hall Law School, has resigned his position.

Mr. E. L. Patenaude, barrister, of Montreal, has become a member of the Borden Government as Minister of Inland Revenue.

The Vancouver Bar Association has subscribed funds for a machine gun, for which act of patriotism they have received the grateful acknowledgment of Colonel Victor W. Odlum, of the 7th Battalion, now at the front.

We have referred elsewhere to the appointment of Mr. C. A. Masten, K.C., of Toronto, as a judge of the Supreme Court of Judicature of Ontario.

Mr. Louis A. Pouliot has been appointed President of the Junior Bar of Quebec for the current year.

We regret to record that an unusual number of deaths among judges and members of the profession are reported since our last issue.[1]

His Honour Neil McLeod, judge of the County Court of Prince County, P.E.I., at Summerside, on Octr. 19th last.

[1] It is almost impossible to prevent occasional inaccuracies in this obituary column of the C. L. T. Corrections will be always gratefully received and duly recorded in our next issue.—Ed., C. L. T.

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His Honour Adam Johnston, junior judge of Prescott and Russell Counties, Ontario, at Vankleek Hill, on Octr. 30th last.

Thomas Woodyatt, LL.B., for 17 years police magistrate at Brantford, Ontario, on Octr. 13th last, at Brantford.

C. J. H. Lloyd, one of the oldest advocates of Quebec, at Quebec, on or about Octr. 28th last.

Lambert John Blair Bond (Bond and Sweet) of Vancouver, B.C., on Octr. 14th last, at Vancouver.

H. D. Gill of Winnipeg, killed in action in France.

R. B. Gordon, of Indian Head, at Indian Head on Octr. 21st.

Joseph A. Wright, of Toronto, at Toronto, on Octr. 3rd last, at Toronto.

Robert Russell Loscombe, K.C., of Bowmanville, on Octr. 7th last at Bowmanville.

John P. Stanton, of Hamilton and afterwards of Kenora, at Dryden, Ont., on or about Octr. 2nd last.

Peter James Mills Anderson, Crown Attorney for the County of Hastings, at Trenton, Ont., on Octr. 4th, last.

Joseph A. Labelle, of Montreal, on Octr. 1st, at Montreal, in an automobile accident.

Donald Ban MacLennan, K.C., of Cornwall, Ont., at Cornwall, on Octr. 8th.

Donald Guthrie, K.C., of Guelph, Ontario, at Guelph, on Octr. 31st last. Mr. Guhtrie was made a Bencher of the Law Society of Upper Canada in 1882.

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The Canadian Law Times.

VOL. XXXV. DECEMBER, 1915. No. 12

BY THE WAY.

We regret that we have to keep our readers waiting yet a little longer for the continuation of Mr. C. C. McCaul's Article on *Options to Purchase Land,* which was commenced in our issue for last September.

We are introducing into our present issue for the first time a new feature, which we hope will be a permanent one, and will meet with the approval of our subscribers and readers. We are referring to a Monthly *Letter from London,* of which we publish the first this month. In these letters, we hope that our readers will be kept informed of all that is of interest to lawyers in the current life of the great Metropolis—gossip about the Courts and judges, references to *causes célébres* pending at the moment or recently decided, shiftings and changes in matters constitutional, new books, pamphlets, or lectures, which are likely to appeal and interest the legal profession, *et hoc genus omne.* Dr. Johnson said that he who is tired of London is tired of life, and if that was true in the days of "the Great Lexicographer," as Miss Pinkerton calls him in *Vanity Fair,* much more is it true in these days, that if we want to be fully alive, we must not be content to be altogether ignorant of what men are doing, thinking, and saying in the Capital of the Empire. We are fortunate to have secured the services of a very able gentleman as our correspondent.

Perhaps stranger cases come before the law Courts of England than before those of any other jurisdiction, owing to the zealous regard for personal and individual rights which distinguishes the mother-land of freedom. The case of *Elinor Glyn* v. *The Western Feature Film Co. and G.*

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Black, which is now before the Courts, is sufficiently amusing. On the 9th ult., Mrs. Elinor Glynn, author of and owner of the copyright in "*Three Weeks*," applied to Mr. Justice Younger for an injunction restraining the defendants from making or authorising the public exhibition of cinematograph films under the title of "*Pimple's Three Weeks Without the Option.*" The question, as counsel for the defendants put it, was whether a *bonâ fide* burlesque which to some extent adopted the plot or style of an original work was an infringement of copyright. They stated that there was no authority upon the point, and submitted that there was no infringement of copyright in a serious work when the other work produced a different kind of pleasure, and was in no way competitive. Mr. Justice Younger, who reserved judgment, is reported to have observed that the action reminded him of the highwayman's action, where one highwayman brought an action against another for an account.

The *Highwayman's Case*, thus referred to by Mr. Justice Younger, was, of course, the case of *Everet* v. *Williams*, supposed to have been decided in 1725, and fully noted in Lindley on Partnership (8th ed., p. 113, n.). One highwayman sued another for an account of their plunder, and in his bill of complaint stated that he and the defendant "dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles, and other goods." —that he and the defendant dealt together in business at several places, to wit, Bagshot, Salisbury, Hampstead, and elsewhere, to the amount of £2,000 and upwards. The bill is said to have been dismissed with costs to be paid by the counsel who signed it; and the solicitors for the plaintiff were attached and fined £50 a piece. The plaintiff and defendant were, it is said, both hanged, and one of the solicitors of the plaintiff afterwards transported.

All lawyers will remember the recent decision of the House of Lords of *E. Hulton & Co.* v. *Jones* in 1910, in which action a gentleman of the somewhat strange name of Artemus Jones, a barrister practising on the North Wales circuit, sued the proprietors of the *Sunday Chronicle* for libel in an Article, in which, describing a motor-festival at Dieppe, they said, amongst other things, '"Whist! There is

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Artemus Jones with a woman who is not his wife, who must be, you know—the other thing!" Whispers a fair neighbour of mine excitedly into her bosom friend's ear.' Naturally, all Mr. Artemus Jones' best friends declared that he was the culprit referred to; and although, at the trial, it was admitted that neither the writer of the article, nor the defendants intended the defamatory statements to apply to the plaintiff, and although the defendants denied on oath that an member of their staff knew the plaintiff, or that there was an existing person of that name, the House of Lords upheld the judgment for the plaintiff. Their lordships held that the tort of libel consists in any language which others, knowing the circumstances, would reasonably think to be defamatory of the person complaining of and injured by it; that the intention of the defendant is inferred from what he did. We see an amusing aftermath of this case in the following notice in *Punch* of November 10th:—

> 'In a recent article in Punch, entitled Tomlinson's Progress, there was introduced a character of the name of Miss Withers, and there was mention of a house called Rosedene. It appears that an actual Miss Withers, in whose neighbourhood there is a house called Rosedeen, is under the impression that she was referred to in the Article. In point of fact the character was purely imaginary, and the author is neither acquainted with this Miss Withers, nor with the neighbourhood in which she resides. Mr. Punch absolutely repudiates all responsibility for what was a mere coincidence arising out of the use of familiar names. At the same time he regrets any annoyance that may have been suffered by the lady.'

Probably some of our readers have shared our difficulty in understanding what has been meant by the recent German clamour for the "freedom of the seas." A writer in the *Times Literary Supplement* for November 18th has made the matter clear. The traditional *mare liberum* dates, as a matter of fact, from the establishment of British naval power, and the phrase was given vogue by Grotius in 1609, and made applicable during his lifetime by the defeat of the Spanish Armada, which, as Queen Elizabeth said, made the sea free to all. What then did Herr Dernburg mean when he endeavoured to persuade his audiences in the United States that British "navalism," as he termed it, is the anti-

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thesis of the freedom of the seas? The sea should, beyond a doubt, be free to all, and is so in time of peace. It belongs to no nation in particular, and Britain's sovereignty, like that of every other power, is limited to her territorial waters. On the high seas, she enjoys no right and exercises no jurisdiction that is not exercised by every other State. No people have benefited by the freedom of the sea enjoyed during British supremacy more than the Germans. Where, then, is the dominion to which the Germans demur? The answer is that they want the sea to be neutralized. Herr Dernburg said in a speech he made in New York last January:—

> "To prevent wars in future we must establish that the free seas shall be plied exclusively by the merchant marine of all nations. Within their territory people have the right to take such measures as they deem necessary for their defence, but the sending of troops and war machines into the territory of others or into neutralized parts of the world must be declared a *casus belli*. . . . If that be done, the world as it is divided now would come to permanent peace."

This is indeed a case of Satan reproving sin. In 1839, Belgium was declared by all the great powers of Europe—including Prussia—to be a "neutralized part of the world," and the violation of its neutrality was made a *casus belli*. But where is the permanent peace, asks the *Times*, and with what assurance can those who broke that part of neutrality appeal for the neutralization of the sea as a guarantee? We get, however, a notion of what Germany means and wants by a "neutral" sea. She has explained that Luxemburg, as distinct from Belgium, observed a true neutrality towards Germany by yielding access to German armies in their attack on France. Clearly a "neutral" land is one which facilitates a German offensive, and a "neutral sea" is one which protects German armies during their progress. It is only on sea that control is an infringement of the rights of others; on land, it is quite legitimate. Germany's moral code is a very simple one: Whatever she can do is right, whatever she cannot is wrong. Germany's power on land is her natural liberty, but the freedom of the seas consists in the restraint of her foes. Germany is one of the greatest beneficiaries of British naval supremacy in time of peace, and her complaint is that she cannot do on sea what she does on land in time of war.

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One of the incidental results of the present international struggle has been that it has brought our Cabinet system of government under the fierce fire of criticism. In our number for September last, we referred to Mr. Ellis Barker's utterances in this connection. In the *Edinburgh Review* for October, Mr. Harold Cox, the editor, has an Article on the subject. We may briefly indicate, first, his line of criticism, and then his suggested remedy, by the following extracts:—

> 'Let any man whom fate has condemned to sit frequently on committees ask himself whether he would care to trust his private fortune to the control of a committee, meeting about twice a week, and composed of twenty-two men—all of them with a multitude of duties to perform, several of them temperamentally obstinate, and a considerable number habitually loquacious. It is true that the whole work of the Cabinet is not done when it is sitting. Confidential papers printed under conditions of extreme secrecy are daily—sometimes almost hourly—circulated to members of the Cabinet. These they are supposed to study, so that they may bring to the Council a matured judgment. In practice . . . it may safely be said that some ministers rarely read half of what they receive. No blame attaches to them for such apparent neglect. Each of the twenty-two (with two or three exceptions) has, in addition to his advisory duties as a member of the Cabinet, very important executive duties as the head of a government department. These latter he cannot neglect; for as regards them, his responsibility is individual and direct. Moreover, if he fails to keep in touch with the work of his department, he will be at a disadvantage in relation to his colleagues when any question affecting that department comes before the Cabinet . . . The trouble is that the means for arriving at a sound collective judgment are barred by the character of the Cabinet. It is in the first place too large for that intimate interchange of thoughts, which takes place when three or four men are bending their minds together to the solution of a difficult problem. In the second place, the heavy departmental duties of the majority of ministers, render it impossible for them to give adequate consideration to the questions that the Cabinet has to decide.'

Mr. Harold Cox suggests as an alleviation of the existing situation, getting rid of some of the old ministerial offices

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which are no longer of any real administrative importance, e.g., those of the Lord President of the Council, the Lord Privy Seal, and the Chancellor of the Duchy of Lancaster; and ceasing to treat the Lord Chancellorship as a political office. But his real remedy is contained in the following passage with which he ends his Article:—

> 'There is nothing to prevent the Prime Minister with the approval of the King, from limiting the Cabinet to five Privy Councillors, none of whom should hold ministerial office. The double effect of this change would be to relieve the members of the cabinet of departmental duties, and at the same time to reduce the departments to effective subordination to the Cabinet. It would still be necessary to appoint a dozen or more ministers to take charge of the principal departments of State, and they would be appointed, as now, from among prominent politicians. One of the most satisfactory features of our system of government is the combination of the temporary politician with the permanent civil servant. Each tends to correct the vices of the other. But in order to secure the full advantages of this happy combination, it is essential that there should be above all the departments a supreme controlling Council independent of the ministers that it has to control. It is hardly necessary to add that the proposed Cabinet, while remaining itself a non-ministerial body, would always be free to invite to its committee any minister or any permanent official whom it wished on occasion to consult.'

With all respect to the *Edinburgh Review,* it is difficult to see how such a scheme could work at all. It would be assuredly necessary—as Sir William Anson says in his *Law and Custom of the Constitution* — that the heads of the great State departments should have seats in Parliament, in order to make the departments responsible to Parliament; and if the heads of departments, who would possess the monopoly of intimate knowledge of the work of their departments were in Parliament, and yet not in the Cabinet, the authority of the Cabinet would, it may be conjectured, soon be over-shadowed by them. The Cabinet would become a body of *rois fainéants;* or, to quote an expression of a few years back, a collection of extinct volcanoes.

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OUR LONDON LETTER.

To the Editor,
Canadian Law Times.

London, November 8th, 1915.

Sir,—Both branches of the legal profession are, of course, feeling the effects of the war. Every member of the profession feels pride in the thought of the large number of his brethren who have answered the call of the King, and have gone forth to serve with the colours. Alas! very many have already fallen in such service, and the Law Society issues each month with their Gazette a Roll of Honour of Solicitors and Articled clerks who have given their lives for their country. But, apart from this aspect of the question, the war has had its effect in very seriously reducing the amount of business, for while litigation on questions connected with prize law emergency legislation, and the rights of alien enemies has been rather plentiful, ordinary litigation has materially decreased, while the lawyer whose business lies chiefly in the realm of buying and selling houses and land, has found himself badly hit, although this business is now beginning to look up again. What ultimate effect the war will have on the legal profession, it is, of course, impossible to prophesy with accuracy, but even before the war fewer men were entering it, and now, of course, the numbers of budding lawyers are much smaller. So much have the numbers of intending solicitors decreased that the Law Society will hold only three examinations next year instead of the customary four, and for the sake of economy have discontinued the separate examinations for Honours formerly held after each final examination. In future Honours will be awarded on the results of the final examinations. The inevitable outcome of all this must be that at the close of the war there will be fewer lawyers, but the doubtful point is whether there will be a lasting disproportionate decrease in business so as to more than counterbalance the decrease in qualified men. It should be noted that while very large numbers of members of the Bar are serving in some way or other with the force, many of these of course never entered the profession with a view to practising, but simply with a view to having some profession. With solicitors, the matter is otherwise. No one becomes a solicitor if he does not intend to practise.

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Another feature of note is the extraordinary increase of late in the number of divorce suits. This is directly a result of the new Poor Persons' Rules, which came into force last year, allowing persons whose total wealth does not exceed £50 to have solicitor and counsel assigned to them free of charge and to have all court fees remitted, provided they appear to have a *prima facie* case. It is believed, however, that this increase is only temporary, and is due to the fact that many persons who have been too poor to institute divorce proceedings on their own account, have waited until the new procedure came into operation.

The last few weeks have witnessed changes in the Law Offices of the Crown, consequent on the resignation of the Irish Leader, Sir Edward Carson, K.C., from the office of Attorney-General. After some little delay, Sir F. E. Smith, the Solicitor-General, was appointed Attorney-General, thus reaching that much coveted office while still in the early forties. He, as Sir Edward Carson did, has become a member of the Cabinet. There has been a difference of opinion as to whether the Chief Law Officer should be a member of the Cabinet, the veteran Sir Edward Clarke, who was for six years Solicitor-General, favouring the inclusion of the Attorney-General in the Cabinet, while Sir H. Poland as strongly opposes it, a view endorsed by the chief legal periodicals.

Mr. George Cave, K.C., an equity lawyer of great prominence in the Chancery Courts, and a Conservative in politics, has been appointed Solicitor-General at the age of 59, although his previous ambitions in the House of Commons seem to have favoured a political rather than a legal career. Apart from Lord Buckmaster, Mr. Cave is the only Chancery lawyer to become a law officer since Sir John Rigby's tenure of that office 21 years ago, although in the past such eminent equity lawyers as Cairns, Selborne, Jessel and Davy have been law officers. These appointments have given general satisfaction. While on the subject of law offices it is well to note that the remuneration of these gentlemen has been much discussed of late in view of the clamant cry on all hands for economy, but there appears at present to be no signs of any contemplated reduction in their undoubtedly enormous fees. It is pointed out that unless they received very high fees, the leaders of the Bar would not accept the position, but on the other hand since the appointments are always political, it by no means necessarily follows that the most eminent leaders will get the office.

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There has been some talk about the undesirability of having a Government largely composed of lawyers, such as the present one, but it has been urged in reply that the successful lawyers who become Cabinet Ministers, have in the course of their career as lawyers, had to deal with all kinds of people, and thus obtained a varied experience of men and things; and of course, on technical matters they have the best expert advice always at hand, so that lawyers seem as competent as any other class of men to govern the country, and indeed their training probably makes them more competent than other men.

Some foolish criticism has been passed at Lord Reading's absence from his judicial duties, consequent on his financial mission to the United States. His Lordship has now returned to his duties as Lord Chief Justice. It has been pointed out that the absence of Lord Reading is not without precedent, for when Sir Alexander Cockburn was Lord Chief Justice he was engaged in the Alabama Arbitration at Geneva, while Lord Russell of Killowen was engaged in the Venezuelan Boundary Arbitration at Paris.

The practice of combining the profession of arms with that of law goes on apace, and it is quite a common occurrence to find lawyers attending summonses attired in naval or military uniform, or in the grey-green of the National Guard—a volunteer training corps.

Women have invaded, so far as they can, the practice of law, and although both the General Council of the Bar and the Law Society refuse them permission to practice, there is no objection to their becoming unadmitted managing clerks to solicitors, and the Law Society has thrown open the use of its library to women who are managing clerks to members. Fortunately, at present this privilege does not appear to be taken advantage of and the writer has only seen one lady venture in.

There was a huge decrease—38,552 cases—in Workmen's Compensation cases in 1914, according to the official returns recently published.

Sir Samuel Evans continues to sit as the Prize Court judge, although, of course, the cases are now fewer than they were, and since his epoch-making decision in "The Kim," where the counsel engaged were so numerous as to require seating accommodation, even in the Press Boxes, there has been no decision of note. The soundness of his

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Lordship's legal reasoning and the impartiality of his decisions have won golden opinions, but judging from the American Note to Great Britain, dated November 5th, they do not altogether meet with unqualified approval in the United States.

The legal year which opened on October 12th, was marked with the usual procession of judges and King's Counsel through the Great Hall of the Law Courts after a service at Westminster Abbey, but this year the judges did not breakfast with the Lord Chancellor at noon as their custom is—another sign of economy.

A good deal has been heard recently as to the vagaries of the Press Censor, and Lord Morley, who himself was formerly a distinguished journalist and littérateur, severely criticised the institution which was stoutly defended by the new Lord Chancellor, Lord Buckmaster, who before his elevation to the Peerage and the Woolsack, had been the Censor. Some sensation has been caused by the action of the military authorities in seizing the plant of London's oldest evening paper, "The Globe," and suppressing the paper itself, on account of its publishing certain news contrary to the Defence of the Realm Regulations.

The Solicitor-General's statement in a recent case that he was prepared to argue that the Crown has in time of war an inherent right, apart from statutory powers, to arrest and detain without trial any person whether a British subject or an alien, seems scarcely defensible. It was probably based on *Ex parte D. F. Morais.*

The passage of Emergency Legislation goes on apace, and the various Acts, Orders in Council and Regulations up to the end of August last fill four substantial volumes, and the work is, of course, by no means finished yet. The latest supplement dealing with the period from April to August runs to 462 pages.

One interesting suggestion intended to stimulate recruiting is that all recruits over 21 should be promised a Parliamentary vote on their return, whether they are now eligible as electors or not.

A clerk in the employ of a firm of solicitors at Lincoln who joining the Army at the beginning of the war, was awarded the V.C. for conspicuous bravery at Givenchy, has died of wounds.

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One of the latest proposals is a moratorium as to the rent, mortgage interest, and life insurance premiums of soldiers on active service. The idea is to postpone the liability to pay these until after the war. It remains to be seen whether Parliament will sanction a scheme which will undoubtedly injure landlords who have in many cases been already badly hit by such measures as the Courts (Emergency Powers) Act.

Two retired judges have recently died. Sir George Farwell, who decided in the famous Taff Vale case that a trade union could be sued. He was much liked by the Bar and as a Lord Justice of appeal did good service; and Sir Thomas Bucknill, formerly a King's Bench judge, who was a man beloved by all, and his death after a short period of retirement is sincerely mourned.

There has been much agitation in certain quarters to reduce the size of the Cabinet. Many people think that a Cabinet of 22 members is too unwieldy to arrive at unanimous decisions or to work expeditiously. In his speech on the conduct of the war on November 2nd, Mr. Asquith announced the formation of a Special Committee of three or five selected from the Cabinet who will be primarily responsible for the conduct of the war.

The new taxation imposed by the recent Budget has met with general approval and no one complains at helping to provide silver bullets to fight the Germans.

Lawyers are a handy set of men. Lord Moulton—a Lord of Appeal in Ordinary—assists the Minister of Munitions as head of the Explosives Department of that Ministry. His Lordship was formerly a great mathematician as well as a lawyer, and when in the Court of Appeal was a tower of strength, and since his elevation to the Supreme Appellate Tribunal has added to the prestige of that august Court.

Although in the formation of the coalition Government Lord Haldane retired from the office of Lord Chancellor, he regularly sits in the House of Lords and in the Privy Council to hear appeals.

W. E. W.

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THE EARLY COURTS OF THE PROVINCE.

By the Honourable William Renwick Riddell, LL.D., F. R. Hist. Soc., Etc., Justice of the Supreme Court of Ontario.

II. (*Continued.*)

The Law Administered.

The law administered in these Courts was, until 1792, the French Canadian law.

The Quebec Act, 1774, 14 George III. c. 83, by sec. 8 provided that in all matters of controversy relative to property and civil rights, resort shall be had to the Laws of Canada as the rule for the decision of the same.

The Constitutional Act of 1791, 31 George III. c. 31, however, by sec. 33 authorized the Legislatures of the new Provinces of Upper Canada and Lower Canada to repeal or vary the existing law; and the Legislature of Upper Canada at its first session promptly passed (as the first exercise of its legislative power) the Provincial Act, 32 George III. c. 1, which by sec. 3 enacted that "from and after the passing of this Act, in all matters of controversy relative to property and civil rights resort shall be had to the Laws of England as the rule for the decision of the same." After October 15th, 1792, the French Canadian law was no longer invoked in Upper Canada.

Method of Trial.

The French (and French Canadian) method of trial was by judges alone. Frenchmen of France and Frenchmen of Canada never tired of expressing their amazement at Englishmen thinking their property safer in the determination of tailors and shoemakers than of judges.

By his Commission of November 21st, 1763, Governor Murray was empowered to establish Courts; and he did so. In the Court of King's Bench, cases were by his Ordinance of September 17th, 1764, to be tried by a jury; and in cases in the Court of Common Pleas, "all tryals . . . to be by jury if demanded by either party."[27]

[27] Dom. Arch. Rep. 1905, vol. 3 (Can. Coñs. Docs.) pp. 149 *seq.*: Ordinance of Quebec, 1764, pp. 6 *seq.* (Osgoode Hall, General Library, D. 2934.)

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In 1775 the old Courts being abolished by the Quebec Act of 1774, a new Court of Common Pleas for each of the two Districts of Quebec and Montreal was erected for trial by judges alone.

But April 21st, 1785, by Ordinance 25 George III. c. 2, sec. 9,[28] it was enacted that either party might require a jury in "debts promises contracts and agreements of a mercantile nature between merchant and merchant, and treader and treader . . . and also of personal wrongs;" nine out of the twelve were empowered to render a verdict. These juries were in cases between Canadians to be Canadian, between natural-born subjects, natural-born subjects, and in equal number of Canadians and natural born subjects in other cases.

After the new Districts were established in 1788 an ordinance, 29 George III., c. 3, was passed April 30th, 1789, reducing the qualification of jurors for these districts; but the right to a jury was not interfered with.

Finally the first Parliament of Upper Canada by the Act of 1792, 32 George III., c. 2, enacted that from and after December 1st, 1792, "all and every issue and issues of fact which shall be joined in any action real, personal and mixed and brought in any of His Majesty's Courts of Justice within the Province . . . shall be tried and determined by the unanimous verdict of twelve jurors duly sworn for the trial of such issue or issues, . . ." the jurors being empowered to bring in a special verdict.

It has been frequently said that all cases were tried without a jury before the passing of the Act; no doubt the mistake was from the fact that until very recently the records of the Court of Common Pleas for Hesse alone were available; no instance of trial by jury appears in these records either before or after the passing of the Act, 32 George III. c. 2. But the original records for two other courts have now been discovered; and in the Courts for Luneberg and Mecklenburg, the records show that jury trials were not uncommon in these Courts from the beginning. The first jury trial in Mecklenburg was July 4th, 1789, Georgeon v. Howard, an action for damage for non-payment of money due on a purchase of wheat: the first in Luneburg (so far as

[28] Dom. Arch. Rep. 1905, vol. 3 (Can. Const. Docs.) pp. 464 *seq.* Ordinances of Quebec, 1777, pp. 1-26 (Osgoode Hall General Library, D. 2935.)

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extant records show) was June 2nd, 1790, Drew v. Daugherty, an action for slander. There are available records for Nassau, but there is no reason to doubt that the jury system was in vogue in that Court also.

As has already been said the Court in Hesse continued to try cases without a jury to the end—probably the parties preferred the decision of a trained lawyer like Powell to the arbitrament of twelve laymen.[29]

The Records.

The Act of 1794, 34 George III, c. 2, which established a Court of King's Bench for the Province also by sec. 30 abolished the Courts of Common Pleas, and by sec. 31 directed the records of pending actions to be sent to the Court of King's Bench: sec. 32 provided for the Records of the Courts being transmitted to and deposited in the Court of King's Bench. This was done in the case of three of the Courts, Luneberg, Mecklenburg, and Hesse; but no trace can be found of the Records of Nassau. The extant Records are in the office of the Archivist of the Province of Ontario, Dr. Fraser the Archivist having found all but one in an obscure corner of the vaults at Osgoode Hall: I found the other (one of the books from Hesse) in the volume afterwards used for Term Book No. 10 of the Court of King's Bench.[30]

III.

Practice of the Courts.

The practice of the Courts next calls for attention.

However interesting from a historical point of view may be the practice of the Courts of the Province of Quebec before 1785, it is to the Ordinance of that year prescribing the practice of the existing Courts of Common Pleas that we must look for the practice in the Courts now under review.

[29] Dom. Arch. Rep. at *supra*, pp. 539 *seq.*; Ordinances of Quebec, 1786 (Osgoode Hall Library, D. 2937), pp. 25 *seq.*

[29] Why the Jury was not called into play in Hesse remains a mystery.

[30] See Transactions of the Royal Society of Canada, vol. 7, 43 *seq.* "Practice of the Court of Common Pleas of the District of Hesse," by the present writer.

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On April 21st, 1785, was enacted, Henry Hamilton,[31] being Lieutenant-Governor, the Ordinance 25 George III. c. 2.[32] By this Act, provision was made for two classes of action (1) those "in . . . causes or matters of property exceeding the sum of £10 sterling,[33] (2) those "in matters not exceeding or under £10 sterling." It will be convenient to consider these in the reverse order.

Where the matter did not exceed £10 sterling, sec. 36 provided that the person claiming a right of action against another should either himself prepare or procure from the Clerk of the Court a "declaration" in the following form:

"Quebec day of 17
(or Montreal)

A.B. Plaintiff,
C.D. Defendant.

The plaintiff demands of the defendant the sum of due to the plaintiff from the defendant for which sum, though often demanded, still remains due, therefore the plaintiff prays judgment."

Of this form it may be remarked that the allegation that the debt was "often demanded" or "unjustly detained" or the like, almost always was to be found in the old "declaration;" such an allegation was never proved or expected to be proved.

[31] Henry Hamilton first appears in the History of this Continent as Governor of Detroit in 1777. The following year he captured Vincennes, whose commander Helm was taken prisoner with a small force of defenders. The well-known George Rogers Clark shortly afterwards besieged the fort; and Hamilton was in his turn forced to surrender. He was treated by Clark with much barbarity, and on Jefferson's order was sent handcuffed to Williamsburg, where his treatment was still worse. Probably as an effect of a letter from Governor Haldimand to Washington, Hamilton was paroled; and he got to England in 1781. He was made Lieutenant-Governor of Quebec in 1784, filling that position a little less than a year. He was a man of no great capacity and but little judgment, although perfectly honest and sincerely desirous of doing his duty. It is probable that the Ordinance of April 30th, 1785, 25 George III. ch. 4, mentioned later, was due to the influence of the British newcomers in the Province. See "The Legal Profession in Ontario and the Law Society of Upper Canada," an address by the present writer, before "The Chicago Society of Advocates," Nov. 9th, 1914, and published by that Society in their "Book" for 1915.

[32] "Ordinances made and passed by the Governor and Legislative Council of the Province of Quebec, Quebec, MDCCLXXXVI" (Osgoode Hall General Library), pp. 25-56.

[33] The pound sterling at that time was usually considered worth $4.44.

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This declaration was filed by the Clerk in his office, a copy made by him and at the foot of the copy a summons was written in French or English according to the language of the defendant ordering the defendant to pay the sum claimed with costs (as stated in the summons) or else to appear in person or by agent before the judges of the Court of Common Pleas (at Quebec or Montreal as the case might be) on a day named in the Summons, otherwise judgment would be given by default. For this summons the Clerk was entitled to a fee of one shilling (20 cents).[34] The Summons was signed by a judge of the Court;. and a copy of Summons and declaration was served on the defendant personally or left at his dwelling house or usual place of residence with some grown-up person there, the person so serving to inform the defendant or grown-up person of the contents; a fee of one shilling was allowed to the Bailiff for this service.[35]

If at the time mentioned in the summons, the defendant did not appear, proof of the service was produced in Court and the judges or any one of them were to hear the cause on the part of the plaintiff and "make such order, decree or judgment and award such reasonable costs of suit as to him or them shall appear agreeable to equity and good conscience."

If the defendant appeared in person or by agent but the plaintiff did not—or if he did, but did not prosecute, or prosecuting failed to prove his case—the action was dismissed with costs.

Judgment might be ordered to be levied by instalments but the time allowed was not to be more than three months from the date of the execution, and in any case execution was not to issue until eight days after judgment. The execution was only against "the moveables" (in substance the personal property); these were seized by a Bailiff appointed by the Court, the seizure published at the door of the parish church on the first Sunday after the seizure, and at the same time notice was given of "the day (at least eight

[34] Ordinance of 20 Geo. III., ch. 3, "Ordinances, etc., MDCCLXXVII" p. 47 (Osgoode Hall General Library). Quebec currency was the same as that afterwards known as Halifax currency or Canada currency, in which £1=$4: 15=20 cents. This was still in use in my boyhood.

[35] 20 George III. ch. 3, pp. 49, 50, of "Ordinances, &c. MDLXXXVI."

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days later) and place (which must have been in the parish) when and where he means to proceed to the sale."

The Clerk received one shilling for entering judgment and one shilling for the writ of execution; the Crier 2d and the Bailiff for seizure and sale 4 shillings.

No fees were allowed to an Attorney where the action was simply in contract; but if it were necessary to fix a line or fence between two different lands, to ascertain a water course, or if it were necessary to examine deeds or writings, an Attorney was to be allowed a fee for conducting the whole case of 5 shillings ($1.00).

In cases exceeding £10 sterling, a declaration was drawn up. This was presented to a judge—he was "empowered and required" to grant an order to compel the defendant "to appear and answer thereto"; this order was presented to the Clerk, whereupon the Clerk would issue a Writ of Summons in the language of the defendant and in the King's name, tested in the name of the judge granting the order and directed to the Sheriff of the District, commanding the defendant to appear in such Court on a day appointed by the judge in his order for the writ "regard being had to the season of the year as well as to the distance of the defendant's abode or place of service from the place where the Court may sit."

The writ and copy of declaration were handed to the Sheriff and he had it served on the defendant personally or left at his house with some grown-up person there belonging to his family and this was deemed sufficient service. Where the debtor was proved to be about to leave the province he might be held to bail on a *ca. re.*

If on the day appointed the defendant did not appear in self or by Attorney, the service was proved and the plaintiff was entitled to "a default" against the defendant; then if the defendant still neglected to appear without good reason for such neglect the Court was to hear the evidence of the plaintiff and direct "final judgment to be entered against the defendant and . . . award such costs thereupon as they shall think reasonable and issue execution" according to law. The plaintiff's proof was filed in Court and remained on record.

If the defendant appeared upon the return day or if he defaulted that day but appeared at the next Weekly Court

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and paid the costs of the default, he was permitted on that day or on some other day appointed by the Court, to "make his answer to the declaration either in writing or verbally" as he thought fit. If the answer was verbal the Clerk took it down and kept it amongst the records of the Court.

If the plaintiff did not appear on the return day or appearing did not prosecute his claim the action was dismissed with costs to the defendant. If either party desired a jury he was entitled to it (the verdict of nine was sufficient); but if neither desired a jury, the Court fixed a day for the hearing. The evidence was then taken down in writing by the Clerk in open court and signed and sworn to by the witnesses. Where witnesses were sick or about to leave the Province they might be examined before one judge in the presence of the parties or their attorneys.

The pleadings did not extend beyond Declaration, Answer and Replication. The qualification of jurors was carefully provided for: all merchants, traders and householders and also those occupying lodgings of the value of £15 ($60) per annum. A list was made out by the Sheriff each year in June: the clerk divided this into a list of those qualified for special jurors and one of those who were entitled to serve only as common jurors—the former to try cases over £50 ($200) the latter those not exceeding that sum.

Execution was tested by one judge and went against goods and lands (a *ca. sa.* was also provided for) the writ was directed to the Sheriff who seized and proclaimed as in the cases under £10 sterling; but he might on the request of the plaintiff take the goods for sale to Quebec or Montreal. Lands must have been advertised for sale three times in the Quebec Gazette, the sale at least four months after the first advertisement. Notice was given also at the Parish Church immediately after divine services on the three Sundays preceding the sale.

If the amount was under £30 currency ($120) the fees of the plaintiff's Attorney were £1. 10s. 8d. ($9.33), the defendant's Attorney £1. 10s. 0d. ($6.00). In these cases the fees of the clerk were fixed at £1. 2s. 6d. ($4.50), not including office copies of papers; the Sheriff was allowed 2/6 (50 cents) for serving process and 9d (15 cents) for entry by the Clerk; the Crier had also 9d; the Bailiff for serving

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any Rule of Court or the like one shilling (20 cents). This last also in cases over £30 Currency.

Where the amount exceeded £30 Currency, the Attorney had a reasonably liberal tariff of fees beginning with "Instructions 6/0" ($1.20). The Clerk also had his Tariff beginning with "Summons 3/0" (60 cents); the Sheriff for serving summons 5/0 ($1.00) and 1/0 for entry by Clerk; the Crier had one shilling.

If the Sheriff was required to arrest either on mesne process (*ca. re.*) or execution (*ca. sa.*) he had 10/0 ($2.00) for the arrest; the same amount for the bail-bond. He had also 2½% on executions (and his disbursements) and £1. 10s. 0d. ($6.00) for a deed of sale.

It should be mentioned that if the defendant was absent in the Upper Country or the lower parts of the Province (that is beyond the Long Sault on the Ottawa River or Oswegatche (Ogdensburgh): or below Cape Chat on the south side or the Seven Islands on the north side of the St. Lawrence) and was not personally served with the summons, no execution was to issue until the plaintiff gave security to refund to the defendant so much as the defendant appearing within a year and a day might be able to set aside and reverse of the judgment. It is of course obvious that this provision could not become applicable to the Courts established in 1788. If the defendant concealed or conveyed away his goods or by violence or by shutting up his house, &c., opposed his effects being seized, execution might go against his person even in cases under £10, "to be taken and detained in prison until he satisfies the judgment." Executions might be awarded from one district into another in all proper cases, whether against goods, lands, or the person.

It may be a matter of some interest to give an actual example of a writ of execution of that period—the writ is the more interesting from the fact that it was issued by William Dummer Powell as attorney for the plaintiff, while he was practising in Montreal and almost immediately before his appointment as First Judge of the Court of Common Pleas for the District of Hesse (see note 19).

Angus McIntosh & Co., merchants, in Detroit, sued Maisonville & Boudy, and July 8th, 1788, recovered judgment in the Court of Common Pleas at Montreal for

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£48 2s. 9d. (Quebec currency) and £7 1s. 6d. costs. A writ of execution was placed in the hands of Edward Southouse, sheriff, at Montreal, but he could not conveniently travel to Detroit to execute it in person; accordingly, he appointed a bailiff on the spot and sent him the writ. The bailiff, it will be seen, received special instructions.

The writ is directed to John Smith, special bailiff, for this purpose appointed at the instance and risk of the plaintiff and not otherwise, to levy of the goods and chattels of said defendants the sum of forty-eight pounds two shillings and nine pence three farthings, current money of the province of Quebec, and seven pounds one shilling and six pence costs, which said plaintiffs, before the Judge of His Majesty's Court of Common Pleas, holden at Montreal, on the 8th day of July instant, recovered judgment against said defendants . . . and in case the goods and chattels of said defendants do prove insufficient to satisfy said debt, etc., you are to seize and take in execution their lands and tenements or so much thereof, etc. Writ returnable on the 2nd day of January next at Montreal.

This writ is endorsed on the back in the usual manner. Style of cause, amount to be levied, and is signed "Powell. Atty. for Plffs."

Accompanying the writ was the following:—

INSTRUCTIONS.

"Angus McIntosh & Co. v. Maisonville & Bondy. } The Special Bailiff must go to the house of either of the defendants and shewing his warrant, must seize or attach as much as he thinks will fully pay the debt & costs. He must take an inventory of the articles so seized, and if the defendants cannot find a solveable person for Guardian to them, he must take them away to a safe place and cry the sale of them on the following Sunday at the Church Door, at the end of the service reading over the articles seized and informing the public that they were taken in execution at the suit of A. McI. & Co. and that he shall sell them to the highest bidder at a certain place on a certain day at least eight days after the advertisement. He should keep a minute of the sale, to whom such article is sold and at what price—get two witnesses to sign

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that minute—from the gross proceeds of the sale deduct the amount of the Execution as set forth in the special warrant together with reasonable charges for seizing, crying and selling—make a statement of the whole and annex it with the Inventory and Minute to the Special Warrant to be returned to the Sheriff's office, paying back to the defendant any surplus and giving him a copy of the account, inventory and sale if required.

(Sgd.) W. D. Powell."

In cases where an appeal lay, the appellant sued out a writ from the Court of Appeals, tested and signed by the Governor, Lieutenant-Governor or Chief Justice; he presented this writ to a judge of the Court of Common Pleas, gave the required security and had his appeal allowed. Within eight days he was required to file his reasons of appeal, otherwise the appellee obtained a Rule or order that unless they were filed within four days the appeal should be dismissed; and if this was not done the appeal was dismissed with costs.

Reasons of appeal being filed, the appellee had eight days to file his answers; failing this the appellant took out a rule for the appellee to file his answers within four days. If default was made, the appellee thereafter could not file his answers but the Court proceeded "to hear the cause on the part of the appellant and proceeded to judgment therein without the intervention of the appellee." The Court had power to extend the time for delivering reasons or answers, upon good cause shown.

When reasons and answers were filed, the Court upon application of either of the parties fixed a convenient day for the hearing.

The costs in the Appellate Court were fixed by a tariff beginning "Instructions, etc., £1 0s. 0d." ($4.00), and a further tariff was laid down for appeals to the King-in-Council.

With the exception of some of these provisions (not applicable to the Courts we are considering), the practice laid down above was followed in the Courts of Common Pleas in the Districts formed by the Proclamation of 1788.

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IV.

THE BAR.

Before 1785, the professions of Barrister, Advocate, Attorney, Solicitor, Notary, and Land Surveyor, were often practised by the same person. By the Ordinance, 25 Geo. III., c. 4[36] a "barrister, advocate, solicitor, attorney or proctor at law" was forbidden to practice as notary or land surveyor. To become a barrister, etc., it was necessary to serve five years under articles (unless the applicant had been entitled to practice in some Court of civil jurisdiction in some other British territory). The student must be examined by the Chief Justice of Quebec or two of the judges of the Court of Common Pleas and "approved and certified to be of fit capacity and character to be admitted."

So far as is quite certain, in these Courts of Common Pleas concerning which we write, only one legally qualified practitioner appeared. That was Walter Roe[37] who practised in the Hesse Court. There was a practitioner in the Luneburg and Mecklenburg Courts, Thomas Walker, who was usually known as "Lawyer Walker." I cannot find any record of his being called, and it may be that he was an irregular practitioner.[38]

[36] 25 George III., ch. 4, pp. 67 *seq.*, "Ordinances, &c., MDLXXXVI."

[37] Walter Roe was the son of a wealthy merchant of London, England. His father died and his mother married again; dissatisfied, he went to sea. After following the sea for some years he was persuaded by his Captain to study law, which he did in Montreal. He was admitted to practise in 1789, and left at once for Detroit, where he practised till the Court was abolished in 1794, appearing in nearly every case of any importance. He became one of the first members of the Law Society on its creation in 1797. He had been entrusted with the duty of delivering up the Keys of the Detroit Fortifications on the surrender in 1796 of that place to the Americans. In the same year he was made Registrar of the Western District by Governor Simcoe (a copy of his Commission is in my possession). After 1794 he did not practise much; a very large amount of land in the western part of the Province passed through his hands, either as owner or as Conveyancer.

His son William was the Clerk in the Receiver-General's Department, who saved much of the Public Treasure of the Province on the capture of York by the Americans in the War of 1812-14, by burying it on John Beverley Robinson's farm on the Kingston Road, east of the Don. William's son Albert E. is in the employ of the Ontario Government in the Crown Lands Department.

[38] Thomas Walker is called "Lawyer Walker" in some of the accounts of early times. It is said that Robert I. D. Gray, the first Solicitor-General of the Province, was in his office; but I find that sometimes he filed a Power of Attorney to act for parties, which was not necessary in the case of a member of the Bar. It is true

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But many persons appeared as "Agents." These were required to file a warrant of attorney or a Power of Attorney, either special and for the particular case or general. It was not sufficient for the party to ask in open Court that a person named should plead for him; and defects in the warrant or power of attorney were noted with great rigour. Unless it was in perfect form, the agent "was not heard."[39]

Of course a member of a partnership was allowed to plead the cause of his firm.[40]

It may be well to take one or two cases to show the pains taken to do justice in the Courts presided over by lay judges.

In the Luneburg Court, November 5th, 1793, the case of Bennitt v. Stratton was called. Both parties appeared and the case was set for hearing on the following day. At this time all issues were by the Act of 32 Geo. III. to be tried by a jury. November 6th the sheriff returned the writ, the plaintiff by leave of the Court filed the declaration, the defendant moved that he might file a plea to the declaration

that frequently he is described as "Attorney" for one or other of the parties, but that is done with some who certainly were not legally qualified practitioners, *e.g.*, Mr. Antill, who is called Attorney for the defendant in Sherwood v. Adams, February 26th, 1793, and counsel for the defendant February 27th, 1793, in the same case (Luneburg Court).

[39] An Agent not appointed by a regular and formal document would be refused a hearing; *e.g.*, in the Mecklenburg (Kingston) Court, July 1st, 1790, before Richard Cartwright and Neil McLean, in the case of McLean v. Farley, "the plaintiff appears in person, James Clark, Jr., appears for the defendant and produced a Power of Attorney, which the Court do not consider to be sufficiently authentic"(ated). The case was adjourned.

In the same Court, in the very first case, Ferguson v. Dorland, March 17th, 1789, before Richard Cartwright, Neil McLean and James Clark, "the defendant appears in person. The defendant prays that Peter Van Alstine may plead this cause for him. It is ordered that the defendant do plead for himself"—and he did. When it is remembered that Peter Van Alstine was a man of such influence and prominence as to be elected the first member for his Riding in the Parliament which sat in 1792, it will be seen how strict was the rule.

[40] *E.g.* In the Mecklenburg Court, January 3rd, 1791, in the case of "Robert Hamilton and Richard Cartwright, Junior, Merchants and co-partners, plaintiffs, Gotlieb Christian, Baron de Richtenstein, late of Marysburg, defendant." "Richard Cartwright, Junior, one of the partners of the House of H. & C. appears in person and filed Declaration." Curiously enough, Cartwright was one of the two judges on the Bench, but all that was done was to note the default of the defendant. On the next Court day, all three judges were present. Cartwright proved the note sued on (dated at Gananoque, November 20th, 1784), for £77 1s. 0d. Quebec Currency, and an account for £4 11s. 3d. He got judgment for £77 1s. 0d. on the note for principal, £25 8s. 6d. for interest, likewise £4 11s. 3d. for the account; in all £107 0s. 9d., "lawful money of this Province, and costs taxed at . . . ."

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—a plea in abatement—and also set up the proceedings in a former action; the plaintiff asked to file an answer to the proposed pleas; all of which the Court were to consider and give judgment in the next day. The following day the Court determined that "the said Pleas seems to have been drawn up by Counsel or Attorney, which the Plaintiff cannot be supposed to be able to answer, having neither Counsel or Attorney to do it; it would therefore be a hardship upon the plaintiff to proceed to judgment upon the abatement in this situation of the case." The case was therefore adjourned till the next term, "in order that the plaintiff may obtain Counsel."

November 8th the defendant says he is not ready for trial, as he "has not got Counsel, and prays that time may be granted him till next term." The following day the case is again called, the plaintiff files a note of hand, the Court refuse the request of defendant for an adjournment to procure Counsel, as the action was on a "plain promissory note," and order him to plead *instanter* and that a jury be impanelled to try the issue. The defendant pleads payment; a jury is called, and a verdict found for the plaintiff for £15 Halifax Currency ($60) and interest. Judgment is directed to be entered for this amount and costs to be taxed. January 31st, 1794, the parties come into Court and say they have agreed to refer their case to arbitration (this I presume was instead of moving for a new trial). The Court agreed and arbitrators were chosen. April 12th, 1794, the plaintiff filed a certified copy of the award and asked to adduce evidence that the original had been stolen or maliciously destroyed. This was granted, and he called three witnesses, one to whom the original papers had been delivered for safe keeping but when "she went to look for them . . . the papers were gone and she has never been able to find them." The others had read the original award and the copy was in substance, as "nighly" as they could recollect the same as the original award. The award was made a rule of Court.

Take a case in the Mecklenburg Court; in 1791 "an action of debt" (really assumpsit) was brought by Titus Simons against Joseph Allen for an alleged balance of £150. 19s. 6d. The defendant set up payment of part of the account and non-delivery of some rum. The defendant asked the Court to compel the production of some receipts

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filed at a trial between the same parties in September, 1790. This was ordered; the Clerk produced the receipts; and the Court considered the matter. Giving judgment the following day "it being fully within their own knowledge and Recollection that on a former trial . . . the (present) plaintiff did ground his defence on a final settlement . . . (the Court) are fully convinced . . . that the plaintiff's demand for monies, etc., previous to that period is a most impudent attempt to pervert the forms of law to the Purposes of Knavery and Injustice"; but the Court awarded £4. 19s. 6d. for goods thereafter supplied.

There were, however, cases in which technicality—and worse—triumphed, e.g., in the Mecklenburg Court in Ferguson v. Carscallen, March 23rd, 1793, the plaintiff filed his declaration for defamation. The defendant appeared and pleaded "Nothing Guilty of the premises set forth in the declaration." The plaintiff "persists in saying that the defendant is Guilty in Manner as set forth in his declaration, which he prays may be inquired of by the Country," —i.e., a jury. A *venire* was ordered to issue, returnable on the following Saturday. On that day a jury is sworn, the plaintiff opens and calls a witness who swears to sufficient to make the plaintiff's case. The plaintiff then produced a certain writing signed by the defendant's own hand. The defendant objected that no written evidence be allowed, as the declaration claimed for words spoken only—"the plaintiff saith that his Declaration sets forth 'speaking, uttering and publishing' and that the said writing is publishing"—in vain, for the Court "order that no written evidence can be given in this cause, for Reason that the damages laid in his Declaration are for speaking only." Verdict for the defendant and the Court took time to consider. March 31st the plaintiff moved for a new trial and the defendant acknowledged that he caused to be conveyed to the jury a paper containing the pleadings. The foreman swore that the jury had agreed that the defendant [sic] should have five shillings damages but that the sum was only to be mentioned if the judge should require to know what damage the defendant [sic] had sustained. Another juryman swore that the jury had agreed that the defendant [sic] should recover only five shillings from the plaintiff [sic]. The Court took the case under consideration. September 15th, 1791, the plaintiff was called and did not appear. The

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next day, Peter Clark appeared for him under a Power of Attorney and asked the case to stand over till the next term, the plaintiff being in Montreal. It was so ordered. January 3rd, 1792, a new attorney, Christopher Georgen, appeared for the plaintiff and asked for judgment on the motion for a new trial. The Court took time to consider. January 9th, a third attorney, James Clark, Junior, appeared for the plaintiff and renewed the motion. It was ordered that the defendant should show cause on the first day of the next term. March 13th the defendant appeared but not the plaintiff, and as it appeared to the Court that the plaintiff had from time to time put off the proceedings and "the defendant represents to the Court that the plaintiff does not appear to proceed according to the motion made by him the last term," the Rule to shew cause was discharged and the defendant dismissed from the action with £4 costs.

That the judges of this Court, at least, consulted authorities is certain. In a case of Belton v. Connor, the plaintiff, a resident of Kingston had been stopped on the street, insulted and struck by James O'Connor, Surgeon, of the same place, and shewed "marks of violence." September 16th, 1791, the plaintiff filed his declaration in Court. John Howard appeared for the defendant under power of attorney, and time was given to the plaintiff to procure his evidence. January 3rd, 1792, the case was set for the next day. That day, Howard for the defendant, demanded a jury, and a *venire* was granted. Saturday, January 7th, a jury was called, three witnesses for the plaintiff and one for the defendant gave evidence, and the jury found for the defendant. The Court took time to consider. January 9th, the plaintiff moved for a new trial; Howard shewed cause, and the matter was adjourned till the first day of the next term. Howard on that day asked to be dismissed as Attorney for the defendant, and the defendant took his own case and asked for time, which was granted. March 19th both parties appear and urge their respective contentions. March 23rd judgment is given, the two McLeans allowing the motion, Cartwright dissenting.

The judgments form interesting reading. It appeared that the assault and battery was clearly proved. Hector McLean said it would be making a dangerous precedent to allow a jury or the people to think that "however great the injury offered to one's person it should entitle him to no damages without he sustains pecuniary loss." Neil McLean

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said that the verdict was contrary to evidence, and "nothing but the matter being of so trifling a nature as not to merit a reconsideration can justify a non-compliance with the plaintiff's prayer." Citing Blackstone's Reports p. 1327 (2 W. Bl. 1327, Leith v. Pope), and Blackstone's Commentaries, Volume 3, page 391, he quotes with approval Blackstone's words: "Next to doing (right) the great object in the administration of public justice should be to give public satisfaction. If the verdict be liable to many objections and doubts in the opinion of his counsel or even in the opinion of bystanders, no party would go away satisfied unless he had a prospect of reviewing it. Such doubts would with him be decisive; he would arraign the determination as manifestly unjust, and abhor a tribunal which he imagined had done him an injury without a possibility of redress."

Cartwright quotes Buller, N. P. 327; Burrows' Reports, p. 609 (*Wittford* v. *Berkley*) *Burton* v. *Thompson*, Burrows' R., p. 664; and thought that though the very intelligent and respectable jury had certainly gone too far and had contrary to the evidence found for the defendant, "the granting of a new trial would only be giving the plaintiff opportunity of harassing the defendant without any material benefit to himself, and it would be unbecoming a Court of Justice to assist the Passions of Mankind." He was of opinion to discharge the Rule. One cannot but think that Cartwright knew something of his fellow Kingstonians and imported into the judicial office some of his private information.

The plaintiff paid the costs, and, March 26th, 1792, obtained a new venire. March 30th a new jury was called, and a second verdict given for the defendant. Next day both parties appear, and on motion of the plaintiff, the defendant not objecting, the case was dismissed with costs.

V.

In the Court of Hesse, there was great regularity, the sole Judge there being a competent lawyer. From a paper read to the Royal Society of Canada, May 28th, 1913,[41] I extract a few cases of interest:

"John Robert McDougall, of Detroit, Gentleman v. Isaac Germain." On July 16th the inevitable Walter Roe filed his

[41] Transactions of the Royal Society of Canada (3rd Series, 1913), Vol. 7, pp. 43-56.

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declaration and the defendant had a default entered against him: on July 23rd, the defendant again did not appear, a second default was entered against him and the defendant directed to proceed to prove his demand on the 20th August—on August 20th the defendant did not appear and the plaintiff "by his Attorney Walter Roe," called evidence. It was proved that the defendant put certain cattle for agistment upon the plaintiff's land on Hog Island (now Belle Isle) agreeing to pay well for them, also that 20 shillings a head was the usual price on the Island—"this action is continued, and remains en Delibere for eight days." On the 27th judgment is entered up for £30 9 5
and £9. 9s. 6d. costs, in all £39 18 11
and a Writ of fi. fa. issued 5 0

£40 3 11

And an alias *fi. fa.* was issued October 2nd for thus sum—which writ was returnable the first Court day in June 1790—for

£40 3 11 and subsequent costs,
£1 15 0

£41 18 11

The costs seem fairly large; it may be that the Clerk did not tax too strenuously—in that respect being unlike a certain English Taxing Officer. Mr. Quirk, of Quirk, Gammon & Snap, had, we are told "never been seen actually to shed a tear but once—when five sixths of his little bill (£196 15s. 4d.) were taxed off in an action on a bill of exchange for £13."

A somewhat curious feature is that the evidence, given as it is, sometimes in English, sometimes in French, is taken down in the language employed by the witness—the orthography in neither language is unexceptionable and the syntax of the French sometimes is very bad—no doubt what appear to be solecisms are really the expressions of the witnesses themselves. The faulty orthography is just that of a man who understands French as spoken but has no need to write it.

For example, on May 26th, 1791, in Graham v. McKenzie v. Louis, Campeau, Mr. Roe appears for the plaintiff; the defendant made default. J. B. Marin was called as a witness and he deposed as follows: (I give the original French and

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all) "Qu'il est commis actuelment employer par le Demandeur et que de leur part il fut Dimanche dernier chez Defendeur pour lui demander sa raison pour avoir pas acquitte las demande actuel. Pour repomse le Defendeur a dit au Temoin que ce est bien vrai que lui devoit le vinght trois Ponds pour une Quart (This does not mean what we call a quart of rum—the 'quart' as is shewn in another case was 'more than thirty gallons'—so that the 'Romme' cost less than $2 a gallon) de Romme qu'il a eut téte passé mais peut pas faire ceste somme bien qu'il avoit demander en plusier maison." Accordingly judgment went for £23 16s. 0d, N. Y. Currency with costs—and the formal judgment for £14 17s. 6d. and costs £6 8s. 6d., in all £21 5s. 8d., Provincial Currency. The computation here is exact—the judgment was for $59.50 of our present currency.

Dollars were not wholly unknown in those days; at a Court holden 9th June, 1791, in a case Samuel Edge v. John Vert, judgment was given that the defendant should pay four dollars and a half and costs.

Some other cases are worthy of note—for example, as shewing an "Equity" practice in this Court of Common Pleas, at the Court held 19th May, 1791, in the case of George Lyons v. Francois Chabut, Esquire, we find the following as the proceedings: "That the plaintiff having this day filed the affidavit of James May purporting that the best and only witness to prove his demands are without the jurisdiction of this Court, and being willing to refer the said demand to the decisive oath of the defendant, prays that a rule may be personally served on the said Francois Chabut, Esquire, requiring him to attend this Court in his proper person on Thursday the 9th of June next, then here to purge himself by his corporal oath from his said demand, failing whereof it shall be admitted and taken pro confesso. The Court order accordingly."

On June 9th the defendant did not appear, the declaration was taken as confessed and judgment was entered for £26. 10s. 4d. currency of New York, equal to £16 11s. 5d. currency of Quebec, with costs. The costs were taxed at £6. 11s. 5d. currency of Quebec. *Fi. fa.* was issued and the money made in full (there is a trifling error in calculation: £26. 10s. 4d. N.Y. currency is equivalent to £16 15s. 2½d. Quebec currency).

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On the 20th August, 1789, in the action of Thomas Cox v. Guillaume Gyeaux of L'Assomption, "Walter Roe for the plaintiff filed his declaration and the defendant appeared in person:

"As judgment was rendered the 23rd of July last against the defendant and execution the 24th of August, and finding by the Return of the Sheriff that the defendants goods and chattels, Lands and Tenements are not sufficient to satisfy the said judgment creditor, and the plaintiff's Attorney suspecting that the defendant had property secreted in the hands of Joseph Pilet, he was therefore summoned before the Court to give his declaration on oath, whom being called and duly sworn and declared to have no effects of the defendant's in his hands at this time, nor have had at the time of the service of the declaration."

August 20th, 1789, "Isaac Dolson of L'Assomption, Yeoman, v. Joseph Perrier, dite Vadeboncoeur of the River of Ecosse, Walter Roe Attorney for the plaintiff, filed his declaration and the defendant being called and appeared in person and acknowledged that the plaintiff was in peaceable and quiet possession of the land in question, and that he did enter upon the premises in manner and in form as set forth in the plaintiff's declaration, which being duly considered, the Court ordered the Defendant to put the Plaintiff immediately in possession of the said premises (this is what we should now call an 'Interim Injunction'), and the action to be considered in the meantime." On August 27th, on consent, a continuance was ordered for eight days; on Sept. 3rd the defendant not appearing the case was again "continued at the instance of Mr. Roe"; on Sept. 10th the defendant still not appearing, the Declaration is set out and a judgment entered for re-entry and £9. 17s. 0d. currency of the Province for costs.

August 20th "James Fraser, Attorney to the Assignees of Thomas Cox v. Pierre La Bute, Walter Roe for the Plaintiff filed his declaration and the defendant being called and appeared in person—and after some altercation, Mr. Roe the Plaintiff's Attorney moved to discontinue the suit. The Court ordered the suit to be discontinued accordingly."

July 23rd "Leith & Shepherd of Detroit, and Copartners in Trade v. Jean Bte. Leduc, fils, of the Parish of L'Assomption, Yeoman." The Defendant admitted his signature to the note, but pleaded infancy. He was ordered to prove

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his plea, and on August 20th he "produced his *Baptistere,*" which proved that he was not a minor at the time of signing the note. His further plea that it was for his father's debt was equally ineffective and judgment went against him for note, interest and costs.

August 20th "Frederick Arnold v. J. Bte. Leduck fils, Walter Roe Attorney for the plaintiff and the defendant appeared and by consent of parties, Claude Rheaume and Isaac Dolson, is nominated to estimate the damages in the Detention of the plaintiff's horses, and to call in the third person in case of Differences reserving to the Court the right of imprisonment of said horses and to report in eight days." The action was, Aug. 27th, continued for eight days; Sept. 3rd "the Court took into consideration the Report of Auditors upon the matter in dispute who were nominated by consent of the parties to report on their differences" and entered judgment for the plaintiff, that Jean Bte. Leduck fils should pay him the sum of £10 of the currency of New York, equal to £6 5s. currency of Quebec (the computation here is exact).

September 3rd "Magdalaine Peltier, spouse of Jacques Peltier, vs. Laurent Maure. The plaintiff filed her Declaration and the Defendant appeared in person. The Court having taken the matter into consideration and find that the plaintiff is under coverture and not authorized by a Letter of Attorney from her husband. It is ordered that the action be dismissed."

Sept. 3 "Antoine Jalbert v. Jonathan Schiffelin, Charles Smyth, Attorney for the plaintiff by Procuration filed his Declaration. The Defendant appeared and says that he owes nothing to the plaintiff, but that he is indebted to him Two hundred and Thirty-one Livres, for which he prays to become an incidental plaintiff, and filed the plaintiff's engagement subscribed by him at Detroit and offers to bring proof that the defendant did not perform his engagement, and also files the account, items of which he begs leave to prove." On the 10th he called "John McGregor of full age and not interested," but all he said was "that he does not know anything respecting the matter in question." Then he called Raphael Bellongir, who said "Que lui ettoit en compagne avec Antoine Jalbert quant le dite Jalbert avoit laisser le service du Defendeur le dix septieme de mai." The case came on again Sept. 17, when judg-

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ment was given dismissing the action with costs. It seems that Jalbert claimed that he had been employed by Schiffelin to go into the Indian Country to Saginan an Indian Post, to help him in the fur trade, but was discharged by him and accordingly claimed £20 16s. 8d., Halifax Currency, as wages—the defendant set up that Jalbert did not perform his engagement, and he claimed 231 Livres as due him by Jalbert. Nothing is said in the judgment about this counterclaim.

August 27th "Catherine Desriviere La Moinodiere Deguindre vs. Her Husband, Antoine Dagnio Deguindre" Declaration filed, defendant noted in default: Sept. 3, second default, Sept. 10 defendant still in default. Plaintiff ordered to produce her evidence next Court day at 9 o'clock in the morning; Sept. 17, the defendant being again absent, the plaintiff produced her marriage contract and called witnesses, who gave evidence in French—I give a sample:—

"Question 2nd by Mr. Roe—Si lui connait les Ettat de ces affaire? Ans. Que non."

"Question 4th by Mr. Roe—Avez vous entendû dire que ce meubles ettes vendû, et par quil? Ans. Que lui avoit entendû dire l'ont ettè vendû a L'ençon."

"Question 5th by Mr. Roe—Si L'ont ettè vendû par le Sheriffe? Ans. Je ne sai pas."

This is rather better than the French in another place "il se pas."

There is considerable evidence about "une Seizer au chez le Defendeur;" and then the case stands over till next Court. Sept. 24th it again stands over for eight days—and the record of all further proceedings is lost.

Sept. 3. In Thomas Cox v. William Gyeaux, the Sheriff had made a seizure, but could not proceed with the sale till "the claims of the different opponents are first satisfied and paid or secured upon the proceeds."

Nicholas Gyeaux, nephew of William, produced witnesses who testified that he "a proposer seminez la Terre de son oncle a motie" and the witness "croix dans sa conscience s'étté a mottier entre l'oncle et nephew."

So he got half of 12 bushels of oats, 12 of wheat and one of Pease, the other half to go to the Sheriff.

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Charles Prout produced a witness who swore that the defendant and Prout "lui avez dit que ce derniere étté en Simmenser chez le primiere une Piece de Bled Fromment et une Piece de Voine a son proper profit"—and so Prout got his wheat (blé froment, what is called in the book bled fromment) and the proceeds of an Indian Corn patch, the oats (voine i.e. avoine) no doubt also.

Louis Gyeau offered his brother Nicholas as a witness, the plaintiff's Attorney, the ubiquitous Mr. Roe, objected on the ground of relationship, but this objection was overruled—and he proved the case well "son oncle Guillaume Gyeaux lui a dit que une de ce vache ettoit a Louis Gyeaux que lui a livre la vache a son Frere que lui a laisser sans le Park le opposent avec les otre annimaux de Defendeur, et que cette vache et une de cette prix en execution." That settled it—Louis got "cette vache."

(Perhaps the defendant's family name was Goyeaux, a well-known name of these parts.)

The same day Phillip Fox obtained judgment against Pierre Durand "that he return the meat of a Hog which he killed, belonging to the plaintiff (or to pay him three pounds New York currency)—and Francis Latour obtained judgment against Louis Trudell that he pay Ten pounds currency (or return to the plaintiff Four Hundred and Fifty Pounds of Flour).

WILLIAM RENWICK RIDDELL.

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DOMINION COMPANIES AND PROVINCIAL LEGISLATION.

The last issue of the *Weekly Notes* brings the news that among the cases set down for hearing by the Privy Council this month or next are *In re Companies*[1] and *Bonanza Creek Gold Mining Company* v. *The King*.[2] As the judgments in both of these cases are likely to go a long way towards settling some, if not all, of the troublesome questions that have arisen as to the limits of the jurisdiction of the Dominion and the provinces respectively in relation to companies, the time may not be inopportune for a few words on one of the questions to be dealt with in one of these appeals.

Among the various questions which have arisen in connection with the general question of the respective jurisdictions of the Dominion and the provinces in relation to companies, there are two which may be said to be of central importance: (1) How far companies incorporated by the Dominion are subject to provincial legislation; (2) What is the meaning of No. 11 of s. 92,—'The incorporation of companies with provincial objects,'—that being one of the powers assigned exclusively to the provincial legislatures. It is proposed in this paper to deal only with the *first* of these questions, and that only with reference to what may be gathered from previous decisions of the Privy Council. If I venture to suggest some formal propositions which might be deemed to accord with all of these decisions, it is rather as a mode of conceiving these decisions together and indicating their general purport that these propositions are suggested, than as an attempt to forecast what may be said by their lordships in their forthcoming decisions.

General Nature of the Question.

The question how far companies incorporated by the Dominion are subject to provincial legislation, is, of course, a question of the interpretation of sections 91 and 92 of the British North America Act, and before attempting to deal with it, we may first briefly recall the general scheme of legislation contained in those sections. In the first place, certain classes of subjects are by section 92 assigned to the

[1] 48 S. C. R. 331.
[2] 50 S. C. R. 534.

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provinces, in relation to which the provincial legislatures may exclusively make laws. In the second place, by the opening clause of section 91, all other matters are assigned to the Dominion, in relation to which the Dominion Parliament may make laws for the peace, order, and good government of Canada. Finally, 'for greater certainty,' that is, to avoid the danger of the provincial powers cutting too deeply into the residuary powers of the Dominion, 29 classes of subjects are enumerated in section 91, in relation to which only the Dominion Parliament may legislate notwithstanding any power that may have been given to the provinces.

Where the Powers of the Dominion to Incorporate Companies are to be Found.

Except in the case of the incorporation of banks, the power to incorporate companies is not, in so many words, given to the Dominion. 'Incorporation of Banks' is mentioned in No. 15 of section 91 as one of the enumerated powers of the Dominion, but as to the incorporation of other companies nothing is said. It has, however, been decided that under its residuary or general powers it is competent for the Dominion to incorporate companies, at least companies with other than provincial objects. In the *Parsons case*,[8] the Privy Council said:—

> "It is not necessary to rest the authority of the Dominion Parliament to incorporate companies on this specific and enumerated power ('the regulation of trade and commerce'). The authority would belong to it *by its general power* over all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces, and the only subject on this head assigned to the provincial legislatures being the 'incorporation of companies with provincial objects,' it follows that the incorporation of companies for objects other than provincial falls within the general powers of the Parliament of Canada."

But its residuary or general powers are not the only source from which the Dominion derives power to incorporate companies. A number of the decisions clearly enough indicate that the Dominion has also power to incorporate

[8] (1881) 7 App. Cas. 96.

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companies under or by virtue of some of its enumerated powers; or that it, at all events, may call certain of its enumerated powers in aid in incorporating and constituting some companies. Thus the judgment in the *Bell Telephone Case*[4] appears to proceed on the footing that the Dominion was legislating under an enumerated power when it incorporated the company; also in the *Grand Trunk Railway Case*[5] the same thing seems to have been implied. The enumerated power of the Dominion to make laws in relation to the 'Regulation of trade and commerce' might indeed by itself be taken to authorize the Dominion to incorporate trading companies, the better to promote trade and commerce throughout the Dominion, — it being generally recognized that the privilege of trading as corporate persons tends to stimulate and develop trade and co-operative enterprise throughout the world. And although in the *Parsons Case* the Privy Council declined to rest the authority of the Dominion to incorporate an insurance company on this enumerated power, yet in the *John Deere Case* they indicated that this power had to be considered in determining the status before provincial laws which the Dominion could give to a trading company which it created. Among the kinds of companies which the Dominion could, presumably, incorporate under an enumerated power would be those whose objects fell within such classes of subjects as Navigation and Shipping, Saving Banks, Lines of Ships, Railways, Canals, Telegraphs and other Works and Undertakings extending beyond the limits of a province, etc.

Distinction between Case where Dominion is Incorporating under its General or Residuary Powers and Case where it is Incorporating under an Enumerated Power.

It is, of course, a well established principle that when the Dominion is legislating under its general or residuary powers, it cannot trench on the provincial field as defined by section 92. On the other hand, when it is legislating under an enumerated power, its legislation overrides provincial legislation, even provincial legislation which would be but for the Dominion legislation fully competent. And not only is Dominion legislation thus paramount when it is

[4] [1905] A. C. 52.
[5] [1907] A. C. 65.

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strictly and substantively legislation under an enumerated power, but the same thing is true of Dominion legislation which is necessarily incidental or ancillary to legislation under an enumerated power. Just because, therefore, its legislation under (or incidentally to) an enumerated power has this overriding and paramount quality, the Dominion, when incorporating a company under an enumerated power (or even when it can for that purpose call in aid one of its enumerated powers to supplement its residuary power), can give to companies which it so incorporates, greater powers in the provinces than it could give to companies which it incorporated by virtue of its residuary power alone.[6] Although it cannot be maintained that this distinction between Dominion companies has been specifically adverted to in the decisions of the Privy Council, it has been referred to in the Supreme Court of Canada, and would seem to be in itself a well founded and quite valid distinction,[7] and one that may still involve some important differences in the status which the Dominion can give to its companies as respects their being subject to provincial laws.[8]

As illustrative of the superior status which the Dominion may give to a company incorporated under one of its enumerated powers, may be mentioned the case of *Toronto* v. *Bell Telephone Company*.[9] It was there held by the Privy Council that the Telephone Company, by virtue of power in that behalf conferred on it by the Parliament of Canada, was entitled to enter upon the streets and highways of the City of Toronto and to lay cables and erect poles and wires under or along such streets and highways, and that a provincial Act making the consent of the City Council necessary to the exercise of the company's powers was *ultra vires*:—

> "The Bell Telephone Company acquired from the legislature of Canada all that was necessary to enable it to carry on its business in every province of the Dominion, and no provincial legislature was, or is, com-

[6] See Palmer Company Law 8th ed. p. 18.
[7] Lefroy, Federal System, pp. 339-382; Leading Cases, p. 49ff.
[8] It may, however, be mentioned here that the distinction is of less importance than it might at first sight appear to be, since the Dominion's enumerated power to regulate trade and commerce would seem, according to the *John Deere case*, to enable the Dominion to prescribe, if not what powers any company should have, at least to what extent any Dominion company should *exercise* its powers.
[9] [1905] A. C. 52.

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petent to interfere with its operation, as authorized by the Parliament of Canada."

Again in *Attorney-General for British Columbia* v. *Canadian Pacific Railway*,[10] the Privy Council held that the Dominion Parliament has full power, if it thinks fit, to authorize the use of provincial Crown lands by a Dominion Railway Company for the purposes of its railway. Still later in the case of *La Compagnie Hydraulique* v. *Continental Heat and Light Company*,[11] the Privy Council held that a Dominion company of this type (although no specific reference appears to have been made to the fact that it was a company of this type) could not be excluded from a designated district in the Province of Quebec by a provincial law which gave the exclusive right to operate in that district to another company: Lefroy *op. cit.*, p. 340. As to the operation of the Dominion's power to regulate trade and commerce when called in aid for the incorporation of trading companies, the Privy Council said in the *John Deere Case* that that power "at all events enables the Parliament of Canada to prescribe to what extent the powers of companies the objects of which extend to the entire Dominion should be exerciseable, and what limitations should be placed on such powers."

This seems to go a long way in favour of the powers that may be given to a Dominion trading company, but it is to be read in conjunction with certain other statements in the judgment as to a Dominion company being subject to provincial laws of general application, to be referred to presently.

A Certain Type of Provincial Legislation to be Laid out of the Case.

In considering the binding effect of provincial legislation on Dominion companies we must first lay aside those provincial laws which, though purporting to be passed in pursuance of the legislative authority conferred on the provinces by section 92, are, in their true aspect, laws relating to matters exclusively assigned to the Dominion under section 91. The question in the case of such legislation is not whether the powers or status of a

[10] [1906] A. C. 204.
[11] [1909] A. C. 194.

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Dominion company can be affected thereby, but whether the province had power to pass such laws at all. An example of legislation of this kind is to be found in *Madden* v. *Nelson and Fort Sheppard Railway Co.*,[12] where it was held that a provincial Act which purported to make Dominion railway companies liable for cattle injured or killed on the railway tracks unless such tracks were properly fenced, was, in its true aspect, legislation in relation to Dominion railways, and, therefore, *ultra vires* of the province. See also *Union Colliery Company* v. *Bryden*,[13] where a British Columbia Act purporting to exclude Chinamen from working in mines was held to be, in pith and substance, legislation in relation to aliens, and, therefore, not competent for the province to enact. A Dominion company is not bound by such laws, not because they interfere with its powers or status as a Dominion company, but because they are invalid to begin with and do not bind anybody.

What Provincial Laws do Bind Dominion Companies.

Laying aside then all such laws as I have referred to, as being invalid to begin with, what provincial laws, we may ask, do bind Dominion companies? The answer of the Privy Council in *John Deere Plow Company, Limited* v. *Wharton*,[14] seems to be that Dominion companies are subject to provincial laws which combine three features, that is to say, provincial laws which,—

(1) are laws of general application,

(2) are really enacted under the powers conferred on the provinces by s. 92, and

(3) do not interfere with the status, powers, or capacities of Dominion companies.

As to the last two features, they might perhaps be stated as one, for the judgment quite clearly implies that provincial legislation which does interfere with the status, powers, or capacities of Dominion companies, is *ipso facto* not within the powers conferred on the provinces by s. 92.

The distinction between a company incorporated by the Dominion under its residuary powers and a company incorporated by the Dominion under or with the aid of an enum-

[12] [1899] A. C. 826.
[13] [1899] A. C. 580.
[14] [1915] A. C. 330.

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erated power, is not (in the *John Deere case*) clearly drawn, although something of the sort may be said to be implied in the way in which the Dominion's enumerated power to regulate trade and commerce is brought forward as the thing which enables the Dominion to prescribe to what extent the powers of Dominion companies shall be exerciseable and the limitations to be placed on these powers. It is probably only in the case of companies incorporated under its residuary powers that the Dominion would need to call in aid this enumerated power.

Laws of General Application versus Laws which Interfere With Status, etc.

A capital distinction appears to be drawn in the *John Deere case* between provincial laws which in some way interfere with the status, powers, or capacities of a Dominion company as such, and provincial laws of general application. The judgment repeatedly refers to provincial laws which interfere with, or destroy, a Dominion company's status, powers, or capacities.

> "The province cannot legislate so as to deprive a Dominion company of its *status and powers*:" (p. 341).
>
> "The *status and powers* of a Dominion company as such cannot be destroyed by provincial legislation:" (p. 341).
>
> "The question is whether . . . the province can interfere with the *status and corporate capacity* of a Dominion company in so far as that *status and capacity* carry with it powers conferred by the Parliament of Canada to carry on business in every part of the Dominion:" (p. 341).
>
> "The provisions in question must be taken . . . to have been directed to interfering with the *status* of Dominion companies, and to preventing them from exercising the *powers* conferred on them by the Parliament of Canada:" (p. 343).
>
> "The legislation in question really *strikes at capacities* which are the natural and logical consequences of the incorporation by the Dominion Parliament of companies with other than provincial objects."

On the other hand the judgment refers no less repeatedly to provincial laws of general application, to which, it is said,

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Dominion companies must yield obedience as well as any one else. From the context in which these references appear, and from the examples of the laws given, they must, it would seem, be taken to mean provincial laws of general application *which do not interfere with the status, powers, or capacities of Dominion companies.* Thus:—

> "It is enough for present purposes to say that the province cannot legislate so as to deprive a Dominion company of its status and powers. *This does not mean that these powers can be exercised in contravention of the laws of the province restricting the rights of the public in the province generally.* What it does mean is that the status and powers of a Dominion company cannot be destroyed by provincial legislation." (p. 341).
>
> "The question is not one of enactment of *laws affecting the general public* in the province and relating to civil rights, or taxation, or the administration of justice. It is in reality whether the province can interfere with the status and corporate capacity of a Dominion company in so far, etc." (p. 341).
>
> "It is true that even when a company has been incorporated by the Dominion Government with powers to trade, *it is not the less subject to provincial laws of general application* enacted under the powers conferred by s. 92. Thus, notwithstanding that a Dominion company has capacity to hold land, it cannot refuse to obey the statutes of the province as to mortmain (*Colonial Building and Investment Association* v. *Attorney-General of Quebec*); or escape the payment of taxes, even though these may assume the form of requiring, as the method of raising a revenue, a license to trade which affects a Dominion company *in common with other companies* (*Bank of Toronto* v. *Lambe*). Again, such company is subject to the powers of the province relating to property and civil rights under s. 92 *for the regulation of contracts generally* (*Citizens Insurance Company* v. *Parsons*)." (p. 342).
>
> "It might have been competent to that legislature (of B. C.) to pass *laws applying to companies without distinction,* and requiring those that were not incorporated within the province to register for certain limited purposes, such as the furnishing of information. It might also have been competent to enact that any company which had not an office and assets within the province should, *under a statute of general application* regulating procedure, give security for costs." (p. 343).

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That provincial legislation, if it interferes with the status, powers, or capacities of a Dominion company, is *ipso facto ultra vires* of the province, at least so far as it affects Dominion companies, appears to be the meaning of the following passage on page 343:—

> "But their lordships think that the provisions in question must be taken to be of quite a different character, and to have been directed to interfering with the status of Dominion companies, and to preventing them from exercising the powers conferred on them by the Parliament of Canada, *dealing with a matter which was not entrusted under s. 92 to the provincial legislature. The analogy of the decision of this Board in Union Colliery Co.* v. *Bryden, therefore, applies.*"

That then is how the matter stands according to the *John Deere case*. No specific distinction is made between the case of a company incorporated by the Dominion under its general or residuary powers, and the case of a company incorporated by the Dominion under an enumerated power. Provincial laws interfering with the status, powers, or capacities of Dominion companies (without distinction) are ineffective—are indeed *ultra vires* of the provinces at least *quoad* such companies. But provincial laws of general application which do not interfere with the status, powers, or capacities of Dominion companies and are laws dealing with matters assigned to the provinces by s. 92, are valid and binding upon Dominion companies.

It remains to be seen whether the Privy Council will modify this formula in any particular in answering questions 6 and 7 of the *Companies Reference case*,[15] now set down for hearing. Will their lordships now 'sift the matter more thoroughly' and remove some uncertainties that still trouble us? Will they give us a series of propositions which will remove doubts in future, and be perhaps easier to reconcile with previous decisions? Will they recognize the distinction between companies incorporated under the residuary power and companies incorporated under an enumerated power? Speculating as to what formula they may conceivably adopt, one wonders whether they might not, for example, say:—

[15] 48 S. C. R. 331.

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(1) That as to companies incorporated by the Dominion under its general or residuary powers, they are subject to provincial laws which in their true aspect are laws dealing with matters assigned exclusively to the provinces under s. 92, *provided* that such laws do not, however, interfere with the status, powers, or capacities of Dominion companies:

(2) That as to companies incorporated by the Dominion under its enumerated powers (or for the incorporation and constitution of which the Dominion may call in aid one or other of its enumerated powers), to such companies the Dominion can give all powers that are necessarily or properly required for the carrying on of their business, works, or undertakings,—at least to the extent that the giving of such powers is necessarily incidental or ancillary to legislation of the Dominion under its enumerated powers:

(3) That to the extent to which the Dominion chooses to give such powers to such companies (those referred to in 2) and the giving of such powers is necessarily incidental to Dominion legislation under an enumerated power, provincial laws cannot interfere, and it makes no difference whether they are laws of general or limited application.

Some Difficulties.

It may seem at first sight that the Proviso to Proposition 1 above should not be inserted. The Dominion, it may be said, when legislating under its residuary powers cannot 'encroach upon any class of subjects exclusively assigned to the provincial legislatures by s. 92' and, therefore, companies incorporated by the Dominion under its residuary powers should be subject to all provincial laws validly enacted under that section. But, on the other hand, the reasoning in the *John Deere case* seems to require the insertion of such a proviso. It is not easy to imagine a Dominion company, incorporated under the Dominion's residuary powers, for the constituting of which the Dominion's power to regulate trade and commerce could not be invoked, as it was invoked in the *John Deere case,* to enable the Dominion to prescribe to what extent the company's powers should be exerciseable. Also, even if it were possible to imagine such a company, we must bear in mind the principle laid down by Lord Watson in the *Liquor case,*[16] that, when a matter

[16] [1896] A. C. 348.

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has ceased to be merely local or provincial and has become *a matter of national concern*, it comes within the jurisdiction of the Parliament of Canada. On that principle, therefore, even if the Dominion's power to regulate trade and commerce were not applicable, the limits to be placed on the powers of a Dominion company incorporated under its residuary powers is a matter within the jurisdiction of the Parliament of Canada. "For," as was said in the *John Deere case*, "If it be established that the Dominion Parliament can create such companies, then *it becomes a question of general interest throughout the Dominion in what fashion they should be permitted to trade.*" It must, however, be confessed that the Proviso is at variance with the *dicta* in the *Parsons case* and in the *Colonial Building and Association case*, about a Dominion company being subject to provincial laws of Mortmain, even though laws went the length of excluding a Dominion company from the provinces altogether. For although such exclusion of a Dominion company might not indeed destroy its 'corporate capacity;' what more effectual way of nullifying its powers and interfering with their exercise could be imagined? We can only confess the variance and say that the *dicta*, however strong, are only *dicta*, and that they have no decision to support them.[17]

Then again these same *dicta* cause difficulty when we come to apply them in the case of a company incorporated by the Dominion under an enumerated power. The passage in the *Parson's case* is as follows:—

> "But it by no means follows that because the Dominion Parliament has alone the right to create a corporation to carry on business throughout the Dominion that it alone has the right to regulate its contracts in each of the provinces." (So far no difficulty). "Suppose the Dominion Parliament were to incorporate a company, with powers, among other things, to purchase and hold lands throughout Canada in Mortmain, it could scarcely be contended if such a company were to carry on business in a province where a law against hold-

[17] Is not reconciliation to be found in this?—The *John Deere Plow Company case* merely holds a Dominion company incorporated under the residuary power to carry on business all over the Dominion cannot be required to take out a provincial license before carrying on business in the province; but nevertheless it can only carry on such business subject to the general laws of the province. Ed. C. L. T.

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> ing land in mortmain prevailed . . . that it could hold lands in that province in contravention of the provincial legislation; and, if a company were incorporated for the sole purpose of purchasing and holding land in the Dominion, it might happen that it could do business in any part of it, by reason of all provinces having passed Mortmain Acts, though the corporation would still exist and preserve its status as a corporate body."

The language here is admittedly wide enough to cover the case of a company incorporated by the Dominion under an enumerated power [17a] and seems to imply that even such a company could not hold land in the provinces, no matter how essential it might be for it to do so in order to carry on its business or undertaking, if the provincial laws said that no company should hold lands in mortmain. But would a Dominion railway company or a Dominion power company or even a Dominion trading company be subject to such provincial laws? It is difficult to think so. See Mr. Wegenast's Article in 35 CANADIAN LAW TIMES, at page 829. So far as the *dicta* in the *Parson's case* being applicable to such a company is concerned, we may observe that the Dominion was not legislating under an enumerated power in incorporating the Insurance Company, and that the provincial law in question did not interfere with the status or powers of the company, no case having been made disclosing an inconsistency between powers granted to the company by the Dominion and the provisions of the provincial law.

The passage in the *Colonial Building and Association case* is as follows:

> "It may also be assumed for the purpose of this appeal that the power to repeal or modify this law (provincial Mortmain Act) falls within No. 13 of section 92 of the British North America Act, viz., "Property and Civil Rights within the Province," and belongs exclusively to the Provincial Legislature; *so that the Dominion Parliament could not confer powers on the company to override it.* But the powers found in the Act of Incorporation are not necessarily inconsistent with the provincial law of mortmain, which does not absolutely prohibit corporations from acquiring or holding lands, but only requires, as a condition of their so doing, that

[17a] But the instances given are all of such companies as could and would be incorporated under the residuary power.—Ed., C.L.T.

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they should have the consent of the Crown. If that consent be obtained, a corporation does not infringe the provincial law of mortmain by acquiring and holding lands. What the Act of Incorporation has done is to create a legal and artificial person with capacity to carry on certain kinds of business, which are defined, within a defined area, viz., throughout the Dominion. Among other things, it has given to the Association power to deal in land and buildings, *but the capacity so given only enables it to acquire and hold land in any province consistently with the laws of that province* relating to the acquisition and tenure of land. If the company can so acquire and hold it, the Act of Incorporation gives it capacity to do so."

But here again the Privy Council was dealing with a company incorporated by the Dominion under its general or residuary powers alone, and, therefore, no question could arise as to whether a company incorporated under an enumerated power would be subject to such laws as mentioned.

Moreover with respect to the *dicta* in both of these cases as to the lack of power of the Dominion to confer powers on a company to override certain provincial laws, we may observe that the doctrine of the Dominion's ancillary and incidental powers had not yet in terms been formulated—that did not come until eleven years later in the *Voluntary Assignments case*,[18] although something approaching it had been said in *Cushing* v. *Dupuy*.[19] Also it may be said that the decision in *Toronto* v. *Bell Telephone Company*,[20] convincingly shows that the Dominion, when incorporating a company under an enumerated power, can give the company powers which a provincial law is powerless to affect—unless we are to suppose that if the Ontario Legislature had put the legislation in question in their Municipal Act and had made it read that 'no person should tear up the streets of a municipality without the consent of the Council,' it would have been effective, a conclusion which is hardly consistent with the sweeping terms of the judgment that "no provincial legislature was or is competent to interfere with the operations of the company as authorized by the Parliament of Canada."

[18] [1894] A. C. 189.
[19] (1880) 5 App. Cas. 409.
[20] [1905] A. C. 52.

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Testing the Above Propositions by the Decisions of the Privy Council.

We may conclude by glancing at the decisions of the Privy Council to see how far the propositions above suggested may be supported by the actual decisions in the various instances in which the question of the legislative control of the provinces over Dominion companies has been raised.

Citizens Insurance Company v. *Parsons*[21] may be viewed as a case where the company was incorporated by the Dominion under its general or residuary powers only, and, therefore, subject to provincial laws, provided they did not interfere with its status, powers, or capacities.

Colonial Building and Investment Ass'n v. *A.-G. of Quebec.*[22] Same kind of a case as the *Parsons case*. The company was incorporated by the Dominion under its residuary powers alone, and, therefore, subject to provincial laws as aforesaid.

Bank of Toronto v. *Lambe.*[23] Though the bank was incorporated by the Dominion under an enumerated power, it was held to be nevertheless subject to provincial laws relating to taxation. The Dominion had not given the Bank exemption from provincial taxation, and, therefore, the question whether the giving of such exemption would be necessarily ancillary to the Dominion's power to legislate in relation to banking did not arise. But had the question arisen in that form, the tenour of the judgment indicates that the power to exempt its corporate creations from provincial taxation would not have been deemed necessarily incidental or ancillary to the Dominion's power to legislate in relation to Banking and the Incorporation of Banks. See pages 585-6 of the judgment: "Their lordships cannot see how the power of making banks contribute to the public objects of the provinces where they carry on business can at all interfere with the power of making laws on the subject of banking, or with the power of incorporating banks."

Tennant v. *Union Bank of Canada.*[24] Where under its enumerated power to legislate in relation to banking the Dominion Parliament was held to have authority to confer

[21] (1881) 7 App. Cas. 96.
[22] (1883) 9 App. Cas. 157.
[23] (1887) 12 App. Cas. 575.
[24] [1894] A. C. 31.

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on banking companies (albeit not in an Act incorporating a bank, but in a general Act), the power to accept a certain kind of security notwithstanding a provincial law to the contrary—the provincial law being moreover one of general application.'

Canadian Pacific Railway v. *Bonsecours.*[25] Where a company incorporated by the Dominion under an enumerated power was nevertheless deemed subject to a "piece of municipal legislation competent to the Legislature of Quebec." In this respect it is the same kind of a case as *Bank of Toronto* v. *Lambe*. No case was made to show that the provincial legislation cut down any power specifically granted to the company by the Dominion, and the question whether under its enumerated power, substantive or ancillary, the Dominion could have endowed the company with powers which the province could not have cut down, did not arise. Incidentally the Privy Council declare that "the Parliament of Canada has . . . exclusive right to . . . dictate *the constitution and powers of the Company,*" but the question how far the Dominion can go in thus dictating the powers of the company, was not, and did not need to be, decided. The Dominion had not given, or purported to give, to the company any powers repugnant to the provincial legislation in question.

Madden v. *Nelson and Fort Sheppard Railway.*[26] A case where a provincial law purporting to be a Cattle Protection Act was held to be in its true aspect Dominion railway legislation, which the province was in any event incompetent to enact. It did not bind a Dominion company because it did not bind anybody.

Toronto v. *Bell Telephone Company.*[27] Where powers which had been given to a company incorporated by the Dominion under an enumerated power, could not be limited or modified by any provincial legislation. "The Bell Telephone company acquired from the legislature of Canada all that was necessary to enable it to carry on its business in every province of the Dominion, and no provincial legislature

[25] [1899] A. C. 387.
[26] [1899] A. C. 628.
[27] [1906] A. C. 52.

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was, or is, competent to interfere with its operations as authorized by the Parliament of Canada."

Attorney-General for British Columbia v. *Canadian Pacific Railway*.[28] Dominion has power, when legislating under an enumerated power, to give to a Dominion railway company power to appropriate even provincial Crown lands for the purposes of the railway. "Their lordships think, therefore, that the Dominion Parliament has full power, if it thought fit, to authorize the use of provincial Crown lands by the company for the purposes of this railway."

Grand Trunk Railway Company v. *A.-G. of Canada*.[29] This is a decision on the power of the Dominion to enact the provisions in the Dominion Railway Act prohibiting Dominion railway companies from contracting themselves out of liability to pay damages for personal injuries to their servants. In this case the Privy Council said:—

> "The true question in the present case does not seem to turn upon the question whether this law deals with a civil right—which may be conceded—but whether this law is truly ancillary to railway legislation." "It seems to their lordships that, inasmuch as these railway corporations are the mere creatures of the Dominion legislature—which is admitted—it cannot be considered out of the way that the Parliament which calls them into existence should prescribe the terms which were to regulate the relations of the employees to the corporation. It is true that, in so doing, it does touch what may be described as the civil rights of those employees. But this is inevitable, and, indeed, seems much less violent in such a case where the rights, such as they are, are, so to speak, all *intra familiam*, than in the numerous cases which may be figured where the civil rights of outsiders are affected. As examples may be cited provisions relating to expropriation of land, conditions to be read into contracts of carriage, and alterations upon the common law of carriers."

City of Toronto v. *Canadian Pacific Railway*.[30] Case which upheld the validity of Dominion legislation enabling

[28] [1906] A. C. 204.
[29] [1907] A. C. 65.
[30] [1908] A. C. 54.

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the Dominion Railway Board to compel any one interested to share with a Dominion railway company the cost of safeguarding a railway crossing, as being reasonably ancillary to Dominion Railway legislation. The legislation was contained in the Dominion Railway Act, but presumably it would have been equally valid if contained in an Act incorporating a Dominion railway company.

La Compagnie Hydraulic v. *Continental Heat & Light Co.*[31] Substantially the same kind of a case as the *Telephone case*. Provincial laws cannot limit the powers of a company incorporated by the Dominion under an enumerated power, providing the giving of such powers is properly ancillary to Dominion legislation under the enumerated power. The objects of the company in this case fell within the exceptions to No. 10 of s. 92, although this fact was not specifically adverted to in the judgment. See Lefroy, Federal System, pp. 342 and 377.

John Deere Plow Company, Limited v. *Wharton.*[32] May be viewed simply as a case falling within the Proviso to Proposition 1. Where a company has been incorporated by the Dominion even under its residuary powers alone, the provinces cannot limit the exercise of the powers and capacities conferred on such a company by the Dominion (assuming that the powers given to the company are to begin with only such as are reasonably necessary for a company designed to carry on business throughout the Dominion), because (1) the enumerated power of the Dominion to regulate trade and commerce extends to enable the Dominion to prescribe to what extent such powers shall be exerciseable by such companies, and (2) assuming that the Dominion alone can create companies to do business throughout the Dominion, the extent to which such companies shall exercise their necessary powers in every province becomes a 'question of general interest' and, therefore, a matter for Dominion jurisdiction within the principle of the judgment in the *Liquor case*.[33]

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[31] [1909] A. C. 194.
[32] [1915] A. C. 330.
[33] [1896] A. C. 348.

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CURRENT COMMENTARY UPON RECENT ENGLISH AND CANADIAN DECISIONS.[1]

Will — Codicil — Ambiguity. — A rule of construction is laid down in *Hearle* v. *Hicks*[2] to the effect that a clear unambiguous gift in a will can only be revoked by codicil by words at least equally clear and unambiguous as those of the original gift. This rule is acted as in the recent case of *In re Stoodley Hooson* v. *Locock*,[3] by Eve, J. A testator, after making numerous specific and pecuniary bequests and devising certain lands for charitable purposes, devised and bequeathed all his real and personal estate, not thereby otherwise disposed of, to his trustees upon trust to sell, and, after certain payments therein directed, to hold the residue and the income in trust as to one-third, for the Society of Promoting Christian Knowledge, and as to the other two-thirds, for the vicar of I. for purposes connected with his church. Afterwards the testator made a codicil, in which, after referring to his will, he continued: "The residue of my estate not bequeathed by the above will I give and bequeath to M. A. L. absolutely, and I appoint her sole executrix of this codicil." A few days after this, the testator died. Eve, J., says:—

> "I do not think the words here are so clear and the meaning so unambiguous as to lead to the conclusion that the testator contemplated the revocation of the residuary gifts in his will. It is perhaps a matter of conjecture what the testator really did mean, but I think the intention as expressed in the codicil is to give M. A. L. such portion (if any) of the residue as may ultimately turn out not to have been effectually disposed of by the will, and no more, and I so hold."

Constitutional law—Royal prerogative in time of war.— The decision of Avory, J., affirmed unanimously by the Court of Appeal, in *In re Petition of Right of X*,[4] is of more

[1] The aim of the Editor is to make this feature of the C. L. T. a really complete and conscientious review of recent English decisions likely to be of use to Canadian lawyers, so that readers of it, from month to month, may rely on no important case escaping their notice. Cases under the English Workmen's Compensation Act, 1906, are not considered as coming under this category.

[2] 1 Cl. & F. 20, 24.

[3] [1915] 2 Ch. 295; 84 L. J. (Ch.) 822.

[4] 84 L. J. (K. B.) 1961.

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constitutional interest than practical importance. It is that the Crown has power in time of war to requisition lands and buildings which are necessary for the defence of the realm without making any compensation therefor, both under the King's prerogative and also under the Defence of the Realm (Consolidation) Act, 1914, and the regulations made thereunder. As a matter of fact, the authorities of the Crown, as no doubt they would always do, expressed their willingness to pay *ex gratia* such sum as might be awarded by the Royal Commissioners appointed for the purpose of assessing compensation in such and the like cases. The fullest statement as to the prerogative is in Avory, J.'s, judgment, with whom all the other judges concur. He says (p. 1962):—

> "If it had been necessary to decide this case on the Royal prerogative alone, I would have devoted more attention to it. A reference to the case of *Rex* v. *Hampden*,[5] the Ship Money case, will shew the amount of learning and argument that may be bestowed upon it; but as the point has been raised I will express my opinion upon it. The case just mentioned, and other authorities, appear to establish that by the Constitution the defence of the realm is entrusted to the Crown, that the law has entrusted the person of His Majesty with the care of this defence, that in this business of defence the "*suprema potestas*" is inherent in His Majesty as part of his Crown and kingly dignity, that in times of war or invasion the maxim *Salas populi suprema lex* must prevail, and that in these times of war, not only His Majesty, *but likewise every man that hath power in his hands, may take the goods of any within the realm, pull down their houses, or burn their corn to cut off victuals, from the enemy, and do all other things that conduce to the safety of the Kingdom without respect had to any man's property.* These propositions are admitted by Mr. St. John in his exhaustive argument against the Crown in that case, and Sir Richard Hutton, one of the judges who gave judgment against the Crown, said (Cols. 1194, 1195), "there are some inseparable prerogatives belonging to the Crown, such as the parliament cannot sever from it[6]. . . such is the care for the defence of the Kingdom, which belongeth inseparably to the Crown, as head and supreme pro-

[5] (1637) 3 St. Tr. 826.

[6] This, needless to say, would not be so laid down now,—by any judge: Ed. C. L. T.

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tector of the Kingdom." And further, he said (col. 1198),— "I do agree in the time of war, when there is an enemy in the field, the King may take goods from the subject; . . . such a danger as tends to the overthrow of the Kingdom." In the *Saltpetre Case*[7] quoted by the Solicitor-General (a decision of all the judges), it is said: "When enemies come against the realm to the sea-coast, it is lawful to come upon my land adjoining to the same coast, to make trenches or bulwarks for the defence of the realm, for every subject hath benefit by it. And, therefore, by the common law, every man may come upon my land for the defence of the realm . . . " And coming to later times, to quote a *dictum* of Mr. Justice Willes in *Hole* v. *Barlow*[8]:—"Every man has a right to the enjoyment of his land: but, in the event of a foreign invasion, the Queen may take the land for the purpose of setting up defences thereon for the general good of the nation. In these and such like case, private convenience must yield to public necessity."

And Cozens-Hardy, M.R., says (p. 1966):—

"If it were said that the prerogative right cannot extend to an aerodrome because aeroplanes were not known in the reign of Richard I., I think the answer is to be found in the somewhat analogous case of *Mercer* v. *Deune*,[9] where the Court of Appeal held that a customary right to "catch and tan" fishing nets was not limited to materials known in the reign of Richard I, but extended to drying nets with suitable materials. So the prerogative applies to what is reasonably necessary for preventing and repelling invasion at the present time, regard being had to the invention of gunpowder and the use of aeroplanes in warfare."

CANADIAN CASES.[1]

Company — One Company Guaranteeing Payment of Advances made by a Bank to Another Company.—Union Bank of Canada v. *McKillop*,[2] is noticeable chiefly because

[7] 12 Co. Rep. 12.
[8] (1858) 27 L. J. C. P. 207, 210; 4 C. B. (N.S.) 334, 345.
[9] [1905] 2 Ch. 538; 74 L. J. Ch. 723.
[1] As most of our subscribers have ready access to the Canadian Reports, it is not deemed necessary to review the Canadian cases in the same detail as the English. Only those which seem of special interest and importance will, therefore, be noticed.
[2] 51 S. C. R. 518.

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it calls attention to sec. 17, subs. (d) of the Ontario Companies Act of 1907, now to be found in s. 23, subs. d of The Ontario Companies Act, R. S. O. 1914, c. 178, which empowers joint stock companies 'to guarantee the contracts of or otherwise assist' any person 'or company carrying on or engaged in or about to carry on or engage in any business or transaction which the company is authorized to carry on or engage in or any business or transaction capable of being conducted so as directly or indirectly to benefit the company.' This enactment, however, was held not to apply in this case, because for one reason the transaction in question was entered into before the passing of it. The Court therefore held the company defendant had no power to guarantee payment of advances by a bank to another company, whose sole connection with the guarantor, was that of a customer, for the general purposes of the latter's business, and that such a contract of suretyship was *ultra vires* and void.

Vendor and Purchaser of Land—Judgment for Purchase Money—Unenforceability When Vendor has Resold the Land.—H. H. Vivian and Co. v. *Clergue*[3] turned largely on the construction which the Court put upon the terms of a special agreement. It has, however, this general interest:—*Cameron* v. *Bradbury*,[4] *Gibbons* v. *Cozens*,[5] and *McPherson* v. *United States Fidelity Co.*[6] proceeded upon the principle that a vendor of land cannot have both his land and the purchase money, and that, therefore, if the vendor has cancelled the agreement or parted with the land, he cannot afterwards enforce any judgment for the purchase-money, or for part of it, against the purchaser because he is not in a position to convey the land to the latter, even though he pay up the whole of the purchase money. *Vivian and Co.* v. *Clergue* shews that such a judgment for purchase money may be unenforceable even though in the meanwhile the vendor has substituted a new purchaser, at a like price, with the consent of the judgment debtor (the original purchaser) who is an executing party to the agreement, and the vendors' right against whom to enforce their judgment against him is expressly reserved in the new agreement.

[3] 51 S. C. R. 527.
[4] 9 Gr. 67.
[5] 29 O. R. 356.
[6] 26 O. W. R. 620.

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notwithstanding anything which should be done under it. What the vendors had done under the new agreement was to cancel it for non-payment of purchase-money in accordance with an express provision contained in it. They had then resold the land to another party. The fact that the original purchaser, the judgment debtor, had lost his character of purchaser by virtue of the new agreement, and had no right to complain of the cancellation of the new agreement, and no right, even if he did pay up the full balance of the purchase money, to claim a conveyance of the land to him, was held to make no difference, because the Court held his position under the new agreement was that of surety for the purchaser, thereby substituted, in respect to the portion of the purchase money, which had fallen due under his original agreement of purchase, and for which judgment had been obtained against him.

Criminal Law—Adjournment—Trial de novo on new evidence. Re Rex v. *White*[1] is important as all cases relating to the liberty of the subject are. In it Middleton, J. decides that a magistrate has no power to adjourn the trial of an accused merely because the evidence for the Crown is unsatisfactory and inconclusive. In such a case the accused is entitled to the benefit of the doubt and to an acquittal. The learned judge says (p. 372):—

> "It is said that in the Police Court the practice has grown up of adjourning cases until called upon, when the magistrate is unable to convict upon the evidence, and when he is yet not satisfied of the innocence of the accused. It need hardly be pointed out that this practice, if it exists, is erroneous. If the guilt of the accused has been established by the Crown to the satisfaction of the magistrate, it is then his duty to convict. If the guilt has not been established to his satisfaction, it is his plain duty to acquit. He is not entitled to adopt any third course and introduce into our practice something analogous to the Scotch verdict of "not proven," and by no device can the magistrate leave the matter in this unsatisfactory position, when the trial may be begun again or may be resumed upon the discovery of fresh evidence."

[1] 34 O. L. R. 370.

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Ontario Workmen's Compensation Act. — Concurrent Jurisdiction of Court and Workmen's Compensation Board. Section 15 of the Workmen's Compensation Act, as amended by Geo. V. c. 24, s. 8, O., provides that any party to an action by a workman against his employer for or by reason of any accident happening to him, while in the employment of such employer, 'may apply to the Board for adjudication and determination of the question of the plaintiff's right to compensation under this Part' (i.e. Part I of the said Act), 'or as to whether the action is one the right to which is taken away by this Part, and such adjudication and determination shall be final and conclusive.' In *Garment* v. *Charles Austin Co. Limited,*[8] Britton, J., holds that, though if the plaintiff in the action does so apply to the Board, the adjudication and determination by the Board is final,—the power to determine that question is not taken away from the Supreme Court. There had, indeed, been an application to the Board, but not any formal adjudication and determination by the Board, and no decision against the plaintiff"s right to recover. Britton, J., therefore, held that, as the defendant company, at the time of the accident complained of, was not doing business as an industry included in Schedule I of the Act, the action was not such a one as required the plaintiff to go before the Board; and, in the result, the plaintiff recovered $500.

Constitutional Law—Roman Catholic Separate Schools. —British North America Act, s. 93. In *Ottawa Separate School Trustees* v. *City of Ottawa,*[9] Meredith, C.J.C.P., has held *intra vires* of the provincial legislature the Act respecting the Board of Trustees of the Roman Catholic Separate Schools of the City of Ottawa, 5 Geo. V. c. 45, thereby over-ruling the contention of the Board that the province has no legislative authority under the British North American Act to regulate the use of French as a language of instruction and communication in the Public and Separate Schools of the Province, or the teaching therein of the French language. The learned Chief Justice says:—

[8] 34 O. L. R. 417. We may refer the reader to an Article on The Workmen's Compensation Act, 1914, by George A. Kingston, a member of the Ontario Workmen's Compensation Board, which we published in our issue for April last (p. 301).
[9] 9 O. W. N. 193.

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> "The creation of the office of Minister of Education, and the enactment of all the elaborate legislative provisions of this Province respecting education, were not for the mere benefit of parent or child; the paramount purpose was the public interest of the Province. For that purpose public schools and compulsory schools are essential; and so public schools were established long ago, and have been and are maintained, and compulsory laws are in force. In consequence of the religious desires of some classes of the community, separation in schooling is permitted; and special separate school provisions were made for the class of residents of the Province described as Roman Catholics. But such separation in "no wise affects the public purposes of the schools, or makes the separate school other than a public school. The trustees of all schools are public officers, and both ordinary and separate schools are subject to the control of the provincial educational authorities, and entitled to share equally in the provincial grants of money made for public school purposes."

The case of *Mackell* v. *Ottawa School Trustees*,[10] referred to in the report, brings up the whole question of the power of the provincial legislature to validate the Regulations of the Minister of Education, which the defendants object to, is on its way to the Privy Council, when, no doubt, the whole matter will be finally set at rest.

Constitutional Law—Functions of the Master in Chambers—Superior Court Judge—British North American Act, sec. 94, subs. 14, 16. Polson Iron Works v. *Munns*[11] is an important decision since it appears to be the first reported case which deals with the power under the Constitution, of provincial legislatures to appoint judicial officers with authority to exercise some of the functions, in Superior Court actions, which are assigned under Judicature Acts and rules to Masters in Chambers in Ontario and in Alberta, and in other provinces. The material Albertan Rule in question is as follows:—

> 'When a statement of claim includes a claim for a debt or liquidated demand and any defendant has delivered a defence, the plaintiff may, on affidavit made by

[10] (1915) 34 O. L. R. 335.
[11] W. L. R. 534.

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himself, or any other person who can swear positively to the facts, verifying the cause of action in respect of the debt or liquidated demand and the amount claimed, and stating that in his belief there is no defence thereto, apply to a judge for leave to enter final judgment for the amount so verified together with interest, if any, and costs.'

Our Ontario Rule 57 may be compared. The contention of the defendant was that the Master in giving judgment for the plaintiff under the above Rule was really exercising the functions of a Superior Court judge, and inasmuch as he owed his position solely to provincial authority, he had no jurisdiction, inasmuch as section 96 of the British North America Act provides that—'The Governor-General shall appoint the judges of the Superior, District, and County Courts in each province, except those of the Courts of Probate in Nova Scotia and New Brunswick.' Harvey, C.J., however, over-ruled this contention, saying—

> "The work in Chambers is practically all leading up to trial and appeal. It is to this subsidiary work that the Master's jurisdiction is confined. The order under consideration is perhaps the nearest approach to determining the rights of parties by trial that the rules authorize the Master to make. But in reality he is not trying the rights of the parties. He is determining that there is no real issue to be tried. It is only when such a situation is found to exist that the Master is authorized to give a judgment in favour of the plaintiff . . . The Master has no jurisdiction in trials or in appeals and all his acts are subject to review by a judge. His office is essentially that of an officer preparing litigation for its legitimate purpose, viz., a trial of the rights of the parties which are exclusively reserved for the judges to whom it essentially belongs. His duties, therefore, while largely judicial in their character do not constitute him a judge, since from them are reserved the essential duties of a judge."[12]

Sale of Book on Instalment Plan—Cancellation before appropriation. In Publishers Association of Canada v. *Rowland*,[13] when the defendant had at the solicitation

[12] The present writer has commented on this case to the best of his ability in 24 D. L. R. 18.
[13] 32 W. L. R. 646.

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of the plaintiffs' agent signed a contract for the purchase of certain volumes on the instalment plan, but the volumes were not at the time of purchase in a deliverable state, nor actually appropriated to the contract, and the defendant on the same day, by letter, cancelled the order,—MacLean, D.C.J. of Saskatchewan held that the implied assent to an appropriation of the goods was withdrawn by the letter of cancellation, and that the plaintiffs could not thereafter convert the executory contract into an executed one. One authority is cited, viz: *Sells Limited* v. *Thomson Stationery Company Limited*[14] which was a case practically on all fours decided by the Court of Appeal of British Columbia on April 7th, 1914, in which MacDonald, C.J.A. says:—

> "I have not been able to find any direct authority upon this point. I am, however, of opinion that the implied assent to an appropriation of the goods was withdrawn by the notice, and that the plaintiffs could not thereafter, without the defendant's assent convert the executory contract into an executed one."

Irvine, J.A., however, in the *Sells case* refers to a case of *Ginner* v. *King*[15] which seems to cover the main point. It was an action in the alternative for the price of goods sold, or for damages for non-acceptance, and as the defendant had cancelled the authority of the plaintiff to deliver before the goods had been appropriated, it was held by the Court of Appeal that the plaintiffs were entitled to damages only, and not to the price of the goods.

Municipal Corporations—Inspectors of Meat—Liability. —*Gaudreau* v. *La Cite de Montreal*[16] is a decision of the Quebec King's Bench which is, perhaps, worth mention, although in truth, the point decided seems somewhat obvious. It held the City of Montreal responsible in damages for the value of meat summarily confiscated and destroyed by its inspectors as unfit for human food, without 'any of the formalities of justice,' as the footnote puts it. Greenshields, J., says (p. 391):—

> "If the City or its officers suspect that food which is being offered for sale to the public, is unfit for human

[14] 32 W. L. R. 646.
[15] (1890) 7 Tc. L. R. 140.
[16] (1915) Q. R. 48 K. B. 388.

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consumption, the city, through its officers, is entitled to act promptly to prevent, by seizure, such merchandise being sold to the public, but before the city destroys a man's property, in my opinion, the owner should have an opportunity to be heard, and should be given a chance to establish, if possible, the contrary of what the officers pretend. I do not believe the legislature ever intended to give to a single individual, chosen by the City, the arbitrary power to condemn, without hearing and *ex parte,* any person's property which he suspected as being unfit for human use."

Druggist — Retailer of Poisons — Responsibility. Van Camp v. *Freeman*[17] is another decision in the latest Quebec reports which may be noticed for the special benefit of chemists and druggists. The plaintiff asked the defendant, a licensed druggist to prescribe for his dog, value $250. The defendant prepared capsules containing strychnine and another poisonous drug, and delivered them for a price to the plaintiff who gave them to the dog, and the dog incontinently died. The plaintiff recovered $125 as the value of the dog. Greenshields, J. says (p. 413):—

"The defendant was in possession of these poisons, and he knew what was to be done with his preparation: he no doubt believed that the medicine could be administered without harm: he made a mistake, and his mistake caused the death of the dog, and the consequent loss to the plaintiff. I am of opinion that there is a clear responsibility in law. If men who are licensed to dispense dangerous and deadly drugs take upon themselves for hire or pay, to do it, and they make mistakes, they must make good their mistakes."

A. H. F. L.

[17] (1915) Q. R. 48 K. B. 410.

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CONTEMPORARY LEGAL REVIEWS AND PERIODICALS.[1]

We regret to learn that, owing to difficulties in connection with circulation of our much esteemed contemporary, the *Law Magazine and Review,* arising from the war, and to the fact that the Editor has received an active service appointment, it has been decided to suspend publication for the period of hostilities.

The *Law Quarterly Review* for October, commences with those valuable and interesting *Notes* on recent English decisions which have been an outstanding feature of our leading English legal periodical from its commencement. The present issue gives us full measure, but not running over, for that it could hardly do. The only severely practical Article in the number, is a long one—'*The Apportionment of Annuities between Tenant for Life and Remainderman,*' by Mr. B. Komarofskye. Of the rest, the two which most commend themselves to us for interest, is one on *The King's Chambers,* by Sir Ludovic J. Grant, Bart.; and one on *The Effect of War on the German Legal Mind,* by Ernest J. Schuster. It appears from the former, that amongst the various maritime pretentions asserted on behalf of England in the seventeenth century, there was one which preceded and outlived the rest, and which related to much smaller portions of the sea than they did, namely,—England's claim to "keep the peace" in the water spaces round the English shores, which were known as the "King's Chambers." This claim appears to rest originally upon a proclamation of King James I., on March 1st, 1604, wherein he declares:—

> 'Our pleasure is that within our Ports, Havens, Roads, Creeks or other places of our Dominion, or so near to any of our said Ports and Havens, as may be reasonably construed to be within that title, limit or precinct, there shall be no force, violence or offence suffered to be done, either from Man of War to Man of War, or Man of War to Merchant, or Merchant to Merchant, of either party, but that all of what Nation soever,

[1] It is by no means the intention of the C. L. T. to make this monthly feature a mere jumble of extracts. Our numerous exchanges from all over the Empire and from the United States are carefully examined as they come in, and attention called to whatever seems most striking and important in them.—Ed. C. L. T.

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so long as they shall be within those Ports and places of our jurisdiction or where our Officers may prohibit violence, shall be understood to be under our protection, to be ordered by course of Justice, and be at peace with the other.'

The limits of these King's Chambers are set out in the presentment of a jury, 'all persons of very great knowledge in naval and maritime affairs,' appointed by Trinity House, on March 4th, 1604, which reads as follows:—

'We whose names are hereunder written, being called before the right worshipful Sir Julius Caesar Knight, judge of the King's Majesty's High Court of Admiralty, and there impanelled, and, sworn upon a jury to set down the bounds and limits, how far the King's Chambers, Havens or Ports on the sea coasts do extend: Do hereby certify and set down (according to the best of our knowledge and understanding) that His Highness' said Chambers, Havens, or Ports are all the sea coasts within a straight line drawn from one headland to the next headland throughout this realm of England.'

One of the most important of the King's Chambers is No. 12 (counting from the Holy Island, southward), which lies between the two forelands. Sailors know it as the 'Downs.' This doctrine of the King's Chambers, though it was at first formulated by the Scottish King, applied exclusively to the English coast and did not extend to Scotland. The doctrine that the waters within accurately fixed lines round the English shores are under the jurisdiction of the Crown, for the enforcement of neutrality and preservation of the peace, falls far short of an assertion of sea sovereignty in the full and proper sense of that comprehensive term, and the object of this Article is to determine the place which the theory of the King's Chambers occupies in the history of the claims once made on behalf of Great Britain to Maritime dominion. We are informed that it is permissible to put the matter in this way, and say that the doctrine of the King's Chambers (or something like it) existing not in the form of a categorical commandment, but as unformulated custom, is to be taken as representing practically the full extent of England's aspirations and endeavours in the direction of sea sovereignty prior to the seventeenth century. But after the accession of the Stuarts, it became only one amongst a number of more extensive pre-

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tensions, which at first sight seem to conflict with or override the more limited claim. We cannot go into this part of the Article in detail. It is sometimes stated, however, in treatises on International law, that the doctrine of the King's Chambers was finally abandoned by Great Britain about the middle of the nineteenth century, and certainly there does not seem to have been any instance in recent years of jurisdiction having been claimed on the strength of the doctrine.

Sir Ludovic Grant concludes with the following:—

> 'It only remains to add that at the present day it is practically impossible to say definitely to what extent Great Britain is entitled by International law to exercise jurisdiction over the bodies of water which were once known as the King's Chambers. Even if it be granted that bays are territorial under International law, the definition of the term 'bay' and the question at what point a bay ceases to be a bay, are amongst the thorniest and knottiest problems which the international jurist has to tackle, as may be seen from the discussions in the North Atlantic Coast Fisheries Arbitration, 1910. Neither the 'ten-mile' limit which figures in several treaties to which Great Britain is a party, nor the 'twelve-mile' limit which has been suggested by the Institute of International Law, has yet been finally and definitively adopted into the law of nations. The utmost, then, that can be said is that while International law in its latest developments probably recognizes some of the smaller King's Chambers as territorial, there are considerable, but indeterminate, portions of the more extensive Chambers over which the protective jurisdiction of the good old times can no longer be legitimately exercised.'

As we have referred at this length to the above Article, we cannot refrain from giving the Admiralty regulation of 1805, which is not referred to by Sir Ludovic Grant, and which ran as follows:—

> 'When any of His Majesty's ships shall meet with the ships of any foreign power, within His Majesty's seas, it is expected that the foreign ships do strike their top sail and take in their flag in acknowledgment of His Majesty's sovereignty in these seas. If any do resist, all flag officers and commanders are to use their utmost endeavours to compel them thereto and not suffer any dishonour to be done to His Majesty.'

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In his Article on '*The Effect of War on the German Legal Mind,*' Mr. Ernest J. Schuster, who is well known by his book published a few years ago, by the Clarendon Press, upon *The Principles of German Civil Law,* and who is himself, of course, as his name indicates, of German descent, gives many interesting and instructive extracts, showing the mental condition of the teachers of law and of the legal profession in Germany at the present time. He tells us that there is one axiom which governs all German judgments on the incidents of the war. Every act that operates to the advantage of the German side is morally right, and every act that operates in the opposite direction, is morally wrong. This axiom in various forms runs through all the utterances on the subject. Amongst others, he quotes a passage from a German writer, named Dr. Hemming, which reads as follows:—

'The law of nations in consequence of the events of the war of 1914, and above all, in consequence of the *brutal non-observance on the part of England of all principles of International law,* has retired from active service for a considerable period, except as regards the action of *Germany, which is accustomed to a conscientious and faithful observance of all treaties and conventions.*'

Mr. Schuster concludes with a notable passage, including two lines of Greek, which I will take the liberty of translating:—

> 'That the leaders of German thought have put aside their manners as well as their powers of reasoning, is clearly, a sign of mental aberration. The cause of this mental aberration, in my opinion, lies very deep. Their is, I cannot help thinking, an uneasy feeling at the bottom of the mind of the German nation, that all the present misery and all the prospect of future disasters caused by the present war could have been avoided if their own leaders had at the critical moment, supported the cause of peace.
>
> 'If the German nation were asked the question:—
>
> "What disease is destroying thee?" there might possibly be moments when the answer would be:
> "Conscience, because I am conscious of having done terrible things."'

Other interesting and valuable articles in this number of the *Law Quarterly Review* are upon *The Origins and*

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Early History of Negotiable Instruments, by W. S. Holdsworth; on *Norway's Integrity and Neutrality,* by Bredo Morgenstierne; on *Notice and Fraud in Registration of Title to Land,* by Mr. Justice J. R. Innes; on *Registration of Title on Business Lines,* by Walter Strachan; on *Hindu Wills,* by D. F. Mulla; and on *Domicile in Countries Granting Ex-Territorial Privileges,* by Charles Henry Huberich.

The *Yale Law Journal* for November, commences with a long Article by Francis J. Swayze, entitled '*The Growing Law,*' the object of which is to show that the law is a living, vital, growing, and therefore, changing organism; that it must continue to live, grow and change; that the changes ought to be by the process of growth, and not by the process of destruction. Lawyers and judges, the writer complains, fall into habits of mental indolence and take for granted the absolute correctness of legal rules, and apply them mechanically. We should not forget that the letter killeth and the spirit maketh alive. Nevertheless, what Mr. Swayze fears most is the development of law according to some preconceived theory,—economic, social or even legal. The Common law owes its strength to the fact that it has developed step by step, as the need has arisen, never taking so long a step that its path could not be retraced if we were found to have gone astray. If the law is to be enduring, it must be suited to the habits and customs of the people. New crops, however, can constantly be raised out of old fields, but only by men who know how to cultivate them. This introduces the following notable passage at the end of the Article:—

> 'Hitherto, the work has been done almost wholly by judges. A new force has come to the front in our country. Lawyers now in the prime of life, have been trained in law schools, and our reports begin to show the results. The demand for law schools has made possible the existence of a trained body of students and teachers who study the law purely as a science, and obtain an historical experience from books wider than any judge can obtain in his short life from personal experience of men and affairs. . . . The scientific advance must come from the schools of law. The time may come, perhaps at no distant time, when our law schools shall attain the high distinction of the medieval schools of Bologna and Bourges. They

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will surely supplant our Courts as the authorized and revered expositors of the law unless the judges can in their opinions break away from the tiresome reiteration of legal principles known to the youngest attorney, and the citation of endless authorities for indisputable propositions, and confine themselves to the task of pointing out the precise principle applicable, the distinction from former cases, and avail themselves of the rare occasions when legal principles can be legitimately developed to meet new situations. . . . The Courts must always, however, be the tribunals which put legal principles to the final test, for the law is not only a science but an art, and the dangers of academic discussion can be avoided by submitting the theories of the closet to the test of practical experience. Mr. Justice Holmes has well said, the life of the law is not logic, but experience.'

Another notable article in the *Yale Law Journal* for November, is entitled, '*A Glance at Equity,*' by Mr. Robert L. Munger. The writer suggests that the development of equitable jurisprudence is the most significant thing in our judicial history, and he sketches it in an interesting way in his Article. He declares that there is no more significant thing in modern times than the English Judicature Act, and the abolition which it carried of all distinction in form between law and equity. This, however, does not satisfy him, but he looks forward to what he calls, "the next great step," namely, the absolute wiping out of all distinction between law and equity in name and principle, as well as in form and procedure. This, no doubt, would have already been attained if the judges had followed the advice of Sir Thomas More, as related by Mr. Munger in a story which is new to us, and which he gives as follows:—

'Although the great Chancellor of Henry VIII., Sir Thomas More, issued but few injunctions, the judges nevertheless complained.[2] He therefore, caused a docket to be made showing the list of them, and his son-in-law, William Roper, in his quaint biography of More, says: 'Which done, he invited all the judges to dinner with him in the Council Chamber at Westminster, where after

[2] The reference is, of course, to the "common injunction," which the Court of Chancery used to issue as a matter of course to stay proceedings in common law Courts on equitable grounds. The common law judges resented this especially when granted after judgment obtained in their Courts, to prevent the plaintiff enforcing such judgment.—Ed. C. L. T.

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dinner, when he had broken with them what complaints he had heard of his injunctions, and moreover, showed them both the number and causes of everyone of them so plainly that, upon full debating of these matters, they were all enforced to confess that they in like case could have done no otherwise themselves, then offered he this unto them, that if the justices of every Court unto whom the reformation of the rigour of the law by reason of their office most specially appertained, would upon reasonable considerations by their own discretions as they were, he thought, in conscience bound, mitigate and reform the rigour of the law themselves, there should from thenceforth by him no more injunctions be granted. Whereupon, when they refused to condescend, then, said he, unto them: "Forasmuch as yourselves, my lords, drive me to the necessity for awarding our injunctions to relieve the people's injury, you cannot hereafter any more blame me."'

As is well known, Lord Mansfield, while presiding over the King's Bench, did give effect to what were essentially equitable principles in common law cases. Probably we may have to wait for the realization of the writer's ideal in the abolition of all distinction between legal and equitable rights, until the striking dream of Sir Frederick Pollock, which is repeated at the end of the Article, is realized:—

'Some one may ask whether we look to see these things ourselves, or hope for them in our children's time. I cannot tell; the movement of ideas will not be measured beforehand in days or years. Our children and grandchildren may have to abide its coming, or it may come suddenly when we are least hopeful. Dreams are not versed in issuable matter, and we have no dates. Only I feel that this one looks forward, and will be seen as waking light some day. If anyone, being of little faith or over-curious, must needs ask in what day, I can answer only in the same fashion. We may know the signs though we know not when they will come. These things will be when we look back on our dissensions in the past as brethren grown up to man's estate and dwelling in unity look back upon the bickerings of the nursery and the jealousies of the class-room; when there is no use for the word 'foreigner' between Cape Wrath and the Rio Grande, and the federated navies of the English-speaking nations keep the peace of the ocean under the Northern lights and under the Southern Cross, from Vancouver to Sydney and from the Channel to the Gulf of Mexico;

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when an indestructible union of even wider grasp and higher potency than the federal bond of these States, has knit our descendants into an invincible and indestructible concord.'

Other Articles in this number are: *Unfair Methods of Competition,* by Gilbert H. Montague, in which he gives many extracts from the debate in the Senate at Washington, upon the Federal Trade Commission Bill, in which the meaning of "unfair competition," was the subject of a very interesting discussion, which it obviously, very well admits of. We commend it as an excellent subject for debating societies.

There is also an article on *Some Phases of Marriage Law,* by Edward W. Spencer, which deals at considerable length with Eugenic marriage legislation. The usual *Comments and Recent Cases,* conclude this excellent number.

The Solicitors' Journal and Weekly Reporter, for October 30th last, says:—

'Two literary references of interest to lawyers have occurred in the daily Press recently—the one to Thomas Flower Ellis, and the other to Francis Vaughan Hawkins. Some Latin verses by Macaulay were printed in the '*Times*' of 13th inst., with a translation by Sir Herbert Warren, President of Magdalen College Oxford, and the MS. was offered for sale on behalf of a Red Cross Fund. The theme was Macaulay's longing to escape from circuit to be at Cambridge once again, and the lines were addressed to Ellis. A note in the *Westminster Gazette* (October 26th), reminds us that this was the famous reporter who collaborated in "Adolphus & Ellis" from 1835 to 1842, "Ellis & Blackburn" (afterwards Lord Blackburn) from 1852 to 1858, and "Ellis & Ellis" (Francis Ellis) from 1858 to 1861. From 1842 to 1852 there seems to have been a gap in his reporting. His first collaborator, John Leycester Adolphus, became County Court judge at Marylebone in 1852, and is remembered as the author of *The Circuiters: An Eclogue* an excellent *jeu d'esprit* aimed at the old special pleading, which was printed in the *Law Quarterly Review*, Vol. I., p. 232. Of the various allusions to pleading placed in the mouths of the two interlocutors, perhaps the best known is:—

'Thoughts much too deep for tears subdue the Court
When I *assumpsit* bring and god-like waive the tort.'

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In connection with the same Latin verses, Sir Herbert Warren recalls (*Times*, 25th inst.) a passage in Macaulay's diary in which, under date July 4th, 1856, he records a breakfast party given by himself to, amongst others, Jowett, Ellis and Vaughan Hawkins, the latter described as a young fellow of Trinity. Jewett does not specially concern us here, though in 1876 he still had a lively recollection of the party, which did not break up till after one. Such was the effect of Macaulay's conversation. But Ellis was the reporter, who was Macaulay's constant correspondent and literary confidant, and Vaughan Hawkins was the famous equity lawyer who was called to the Bar in the same year, and died in 1908. Seven years after his call, he produced his *Concise Treatise on the Construction of Wills*, and what he was like in 1856 may be guessed from the portrait of him at sixteen, which Mr. C. P. Sanger has prefixed to the second edition of that famous work. It is not many legal authors whose memory is preserved in so pleasing a form. In later years, his vast knowledge and ability would have entitled him to high preferment had they been accompanied by the faculty of expressing himself in Court. But apparently he never aspired beyond the practice of a junior at the Equity Bar, a position with which many first-rate counsel have been—and are—content.'

As those who have read our monthly Article on *Current Legal Reviews and Periodicals* lately will have noticed, Samuel Warren's famous novel *Ten Thousand a Year* has been receiving a good deal of attention. *Law Notes* (Northford, New York), for November last has the following:—

'The most famous of legal novels is Warren's *Ten Thousand a Year*, but although it was written by a very distinguished lawyer and law writer, it contains a very palpable legal error. In the celebrated trial which was to decide whether Mr. Tittlebat Titmouse was to become a gentleman with ten thousand a year or whether his sublime soul should be crucified in a linen draper's shop, a deed is produced and offered in evidence which would have given the grinning jackanapes his quietus and rendered his brilliant array of counsel immediately *hors de combat*. What happens? The learned counsel, Mr. Subtle, rises (it is a pregnant moment when counsel rises) and objects to the deed because of an erasure which had been made by a clerk when he copied it. The honourable attorney-general argues for the sufficiency of the deed, all the time talking good law, though *contra*

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spem, we are told. Lord Widdrington, after consultation with brother Grayley, solemnly sustains Mr. Subtle and declines to allow the deed. It was never the law that an erasure vitiated a deed if made when engrossed, and no authority from Coke down ever held so. And yet Mr. Samuel Warren, Q.C., not only makes this blunder but commits it in the interest of a Tittlebat Titmouse.'

The same excellent periodical, in its issue for October 23rd last, has the following admirable remarks upon the question whether we should allow the Germans to degrade our own standards of action:—

'The wanton murder of civilians under the orders of the German military authorities not unnaturally evokes a demand for reprisals by this country. This was voiced by Sir Arthur Conan Doyle in a letter to the '*Times*' of the 14th inst., and there have been other letters in the same sense. But, as we have before pointed out, reprisals are only justifiable if they respect the laws of humanity and of morality, and, unless this country is to enter upon a competition with Germany in acts of savagery, there can be no British reprisals by the intentional slaughter of unoffending civilian Germans. We are glad to see that such authorities as Lord Alverstone (whose letter we print elsewhere) Lord Bryce, Professor Dicey, and Sir Edward Clarke take the same view, and we do not doubt that it is the view, which will commend itself to the British military authorities and to the great mass of the public. It is a catastrophe enough that there seems at present to be no way of bringing the war to an end without the continuance of death, suffering, and distraction which appeal to the imagination. The catastrophe would be infinitely increased if the war were to result, in a progressive resort to worse and worse forms of barbarity. The Germans have to their account a host of crimes—the last and not the least, the execution of Miss Cavell. And they childishly protest against our blockade! We must hope to restore the peace of Europe by such clean weapons as we have at our command, and not by recourse to the weapons with which we are opposed.'

We are grateful to the *Law Times* of October 23rd last, for calling our attention to the following very interesting Article which appears in the *New York Times* of the 3rd Oct.:— .

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'After spending eight months in England representing the interest of American shippers and importers in the case of the steamship 'Wilhelmina' and in other important cases, Arthur Garfield Hays, of Hays, Kaufmann, and Lindheim, 60 Wall St., has returned to the United States, impressed with the fairness of the English officials and convinced that they are doing everything possible to combine loyalty to their nation with equitable treatment of the Americans whose cases come before the Prize Court, the Board of Trade, and other institutions. Mr. Hays arrived last Thursday on the steamer *Nieuw Amsterdam*.

'"Americans who fear damages from the English blockade," Mr. Hays said, "are naturally inclined to resent the British interference with their trade and to imagine that the Government is not willing to give them a square deal; but I want to say emphatically that the English Government is doing everything in its power to arrive at an equitable adjustment of every case which comes up incident to the blockade, and that American shippers and importers will receive legal justice and every extra-legal consideration consistent with England's unshakable determination to win this war.

"When I went to England I represented the owners of cargoes on a number of seized ships—the *Wilhelmina, Alfred Nobel, Kim, Bjornstjerne Bjornson, Fridland,* and others—and I also represented American importers who had German goods consigned to them prior to March, 1915. I expected difficulties because some of the issues between my clients and the English Government were rather acute: I didn't really know just what to expect.

"Well, the first thing that impressed me was the cordiality with which I was greeted by every English official. There was no hypocrisy in their attitude. They knew what I represented and what I wanted and they evinced a sincere desire to hear my side of every case. At the hearing before the Prize Court, the Board of Trade, and other bodies I was treated with the same fairness and open-mindedness that I would have had before any Bench in the United States. Often I had to take positive issue with opposing English opinion, but always I was heard with a courtesy that was more than empty complaisance. I could see that the judges were desirous of giving my arguments honest consideration before making their decisions.

"And I gained the decisions on many points. An appeal to law that could not be refuted was always accepted. Further, I found that in cases in which an ultimate decision could not be reached at once, the

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authorities, especially in the Board of Trade were unexpectedly willing to make advance payments on seized cargoes pending settlement of legal questions. For instance, the Board of Trade made an advance payment of 10 cents a pound on 30,000 bales of cotton owned by my clients. This price—only an advance payment, mind you—was as much as the cotton brought in the market, so that whatever else is allowed on it will come out of the treasury of the English Government, and I am confident that a further allowance will be made.

"In the matter of the wheat on the *Kim, Fridland, Bjornstjerne Bjornson,* and *Alfred Nobel,* I was able to obtain the release of 500,000 bushels for which I obtained more in the English market than the owners would have received had the wheat been delivered at its original destination, because while the English Government was holding the cargoes for adjudication, the price of wheat went up. In the Wilhelmina case the Government has allowed about one-third of the value of the cargo, and will make further allowance, on which it will lose money, for much of the cargo has deteriorated.

"Let me say, too, that American importers and exporters can place every confidence in the English solicitors who represent them. There may be a natural inclination on the part of some Americans to believe that their cases will not receive proper attention from English lawyers who, to represent Americans, must often take issue with their own Government; but there is no real ground for this suspicion. You see, in England, a lawyer's legal acts and opinions in the interest of a client are not regarded as his personal acts and opinions, and any lawyer may fight his Government on behalf of an American client without in any way impairing his loyalty to his country. Americans may rest assured that the English solicitors representing them will be faithful to them."'

We are indebted to the *Law Notes* (Northport, Newport, New York), for November last for the following:—

Lord Reading, at a reception tendered by the Association of the Bar of New York City, October 14th, delivered a remarkable address. The comment of this foremost English lawyer on a situation which more and more perplexes his American brethren, will be read with wide interest:—

"Blackstone said that the common law can only be understood if its history is studied," said Lord Reading, as quoted in the New York *Times*. "I am sure that

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no one has given time to the study of our English history without understanding how essential it is to know what led to the great pronouncements of the common law. But the common law is a great labyrinth without such a study. If you understand its history, the common law appears symmetrical with alterations marking the stages of its development, but the whole is harmony, and once you get the key to the solid principles which stand for justice and liberty the rest is easy to understand. We, in our country, have striven for thirty or forty years to administer the law in the full understanding that it is really secondary to justice. We started with the idea that a court of justice is intended to administer justice. The law is there for those to study who wish to give advice and who wish to follow the safe course, and for judges to understand in order to have the principles in passing on facts. Speaking for myself, I am strongly impressed day by day with the undesirability of the constant reporting of decisions which lay down no new principle, but only report the application of old principles to new facts. I think that I recognize a feeling of satisfaction which the members of the Bar would have in getting rid of their thousands of volumes of decisions so that they might base themselves on the solid principles of the law. This system of citing corroborating cases has been changed with us. We now strive to get at the merits; to allow no technicalities to prevent the Court from perceiving the true facts and arriving at a just decision, notwithstanding all the learned counsel who appear before the judge. We believe that is the true principle that should animate the Courts of justice."

We are glad to see, that the *Law Journal* (English), of October 30th last, contains some very proper comments on Lord Reading's remarks as reported somewhat differently, elsewhere. It says:—

'"The idea that it is the duty of the Law Courts to dispense law is becoming obsolete. It is recognized that the true duty of the Courts is to dispense justice." This paradox is attributed to Lord Reading at a banquet given by the New York Bar Association on October 14th, but we take leave to doubt the accuracy of the report, for the statement is capable of a most mischievous interpretation, and Lord Reading would be the last to suggest that cases are not to be decided according to the law of the land, but according to what each judge thinks is just. Justice is a relative term dependent on the standard with which

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a comparison is made. A distinction between law and justice surely indicates that the standard is something other than law. Now, the standard, outside the law of the land, are the Law of God and the rules of public opinion. If the Law of God be the standard, the doctrine rehabilitates the Blackstonian fallacy that the laws of man are invalid if contrary to the laws of God, and no judge nowadays would claim to be entitled to refuse to enforce the law of the land on any such assumption. If the law of public opinion be the standard, is the judge to constitute himself the arbiter of such a vague and uncertain body of principles and to refuse to enforce the law of the land if inconsistent with his view as to public opinion? As pointed out by Professor Salmond in his 'Jurisprudence,' one of the uses of law is to keep justice clean and impartial. The rules being publicly known, any departure from them is subject to the censure of public opinion, whereas within the sphere of individual judgment the difference of honest opinion are so manifold and serious that dishonest opinion can pass in great part unchallenged and undetected. The old Ciceronian doctrine still holds: "We are the slaves of the law that we may be free;" that is, free from the partiality of a Bench left to administer justice according to each individual judge's view of what is right and wrong. Again, another of the uses of law is uniformity and certainty, so that the judges knowing the rules can enforce them uniformly, and the citizens knowing them can shape their conduct accordingly. If what is lawful and unlawful is to be left to the individual judgment of the Bench, how can the citizen know what will be held lawful or unlawful in any particular case? The justice of an Eastern king sitting in the gate is justice in its crudest state, neither certain, clean, nor impartial. The justice the Bench is appointed to administer according to law is justice which has been purchased in this land by the blood of those who have laid down their lives and fortune to withstand the tyranny of despotic kings or the worse tyranny of subservient tribunals. This it is which has given us the cleanest and most impartial Bench with which any land has ever been blessed. If laws require reforming then Parliament, acting openly and in the face of the nation, is the only proper body to effect such reforms; the function of the judges is to administer justice according to law.'

From the issue of *Law Notes for* November, we also cull the following:—

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'The completion by Lord Halsbury, on September 3rd, of his ninetieth year reminds one of many remarkable cases of longevity both on the Bench and at the Bar. The illustrious Sergeant Sir John Maynard was at his death in his eighty-ninth year, having been within a few months of his death Lord Commissioner of the Great Seal. The Right Honourable James Fitzgerald, the Prime Sergeant of Ireland, died in 1834, in his ninety-fourth year, after a great career at the Bar in Ireland and in the Irish and English Houses of Parliament, being requited with the offer of a peerage, which was, however, declined. Mr. Robert Holmes died in 1859, in his ninety-fourth year, as Father of the Irish Bar, of which he was an acknowledged leader although a stuff gownsman, having refused the highest promotion and the office of Solicitor-General. Lord Plunket Lord Chancellor of Ireland, died in 1854 in his ninetieth year; Lord Lyndhurst at his death in 1864 was ninety; Lord Brougham at his death in 1869 had all but completed his ninetieth year; and Lord St. Leonards at his death in 1875 was ninety-four. The Right Honourable Thomas Lefroy, Lord Chief Justice of Ireland, who presided over the Irish Court of Queen's Bench in 1866 when he was past ninety, died in 1869 in his ninety-third year. Vice-Chancellor Bacon who died in 1895 in his ninety-seventh year, continued to discharge the duties of Vice-Chancellor till 1886. In Canada, Sir James Robert Gowan, who died in 1910 in his ninety-sixth year, had the unique record of sixty years of judicial work.'

We notice, also, in the same periodical an Article extracted from the *Brooklyn Eagle,* which refers to a matter of a good deal more than local interest and application, as we think our readers will agree:—

'Granted a growing girl in a street car, having the vivid imagination of her age, stimulated by many movie shows, and things may happen. A girl jumped off a car, rushed melodramatically to a policeman, declared she had been "annoyed," and insisted that the bluecoat follow up the car. Then she "identified" a man, the policeman complaisantly arrested him, and he was subjected to an ordeal most intolerable to a person of standing in the community. A minor or a woman traveling on a surface car is not at the mercy of an occasional drunken man or degenerate. A conductor is on board, authorized by rule and by law to eject any disorderly person. It is not on record that this child made any

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complaint to the conductor or any protest to fellow passengers, who could see what was going on. The late Justice Gaynor laid down sharply the rights and duties of policemen. Having reason to believe that a felony has been committed a policeman may arrest a suspected person without seeing anything himself. In case of an alleged misdemeanour he may arrest, if he has seen the act; not otherwise. The policeman in the above case had seen nothing. We are inclined to think that the Police Commissioner should look into this sternly and impartially. The law does not contemplate the subjection of everybody's reputation to the mercy of allegations made by some other person, whether minor or adult. The wrong done by an unjust arrest is too grave to be tolerated.'

We welcome this protest of the *Brooklyn Eagle,* which evidently is a bird of freedom. The Article is printed in connection with a proposal of the law faculty of Northwestern University, headed by Dean Wigmore, the distinguished authority on Evidence, that a law school for policemen should be established in Chicago, designed to instruct the members of the police department in the elementary principles of the law, and police science.

The Columbia Law Review for November, has the first instalment of an Article by Mr. Thomas Willing Balch on "*Arbitration, as a Term of International law.* Mr. Balch complains that of late years a tendency has arisen to confound International Arbitration with Municipal Arbitration, and to minimize, if not indeed to deny entirely, the judicial quality of arbitration as a component part of the Law of Nations. This confusion, he says, is due to a failure to realize that the word "Arbitration," has come to have different meanings according as it is used in Municipal law, on the one hand, and International law, on the other, he therefore proceeds to examine the meaning of the word "Arbitration" as used in the dictionaries, and to test its sense and meaning as used by some of the undoubted masters of the science of the law of Nations. When he continues, in a future number, he proposes to compare the judgments given by the Geneva and Paris International Tribunals in the *Alabama claims* and the *Bering Sea Fur Seal cases* respectively, with some decisions rendered by some notable Municipal Courts; and so to arrive at a just opinion as to what was intended

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by the men who thought out and developed the institution of International Arbitration.

There is also an Article by Mr. Russell T. Mount on *Prize Cases in the English Courts arising out of the present war.*

The Illinois Law Review for November commences with a short Article by our Mr. Justice Riddell in which he shews the large and creditable part which judges and lawyers,—or as he seems to prefer, judges and other lawyers have taken in international arbitrations during our century of peace. We are glad to see, also, that the *Illinois Law Review* is carrying out the excellent idea of publishing extracts from lay classics bearing upon law. The extracts in this number are from Sir Thomas Elyot's (1490-1546) *Boke named the Governor,* which 'treateth of the education of them that may hereafter be deemed worthy to be governors of the public weal.' Sir Thomas Elyot was a contemporary and friend of Sir Thomas More. Perhaps the most interesting passage in the present extract, which is from Chap. XIV. of Book 1 (Dent's ed. pp. 62-69) is where Sir Thomas Elyot recognizes the undeniable fact that a training in pure philosophy is the best preliminary education for the future lawyer. He says:—

> 'But to resort unto lawyers. I think verily if children were brought up as I have written and continually were retained in the right of study of very philosophy until they passed the age of xxi years, and then set to the laws of this realm (being once brought to a more certain and compendious study, and either in English, Latin, or good French, written in a more clean and elegant style) undoubtedly they should become men of so excellent wisdom that throughout all the world should be found in no common-weal more noble counsellors, our laws not only comprehending most excellent reasons, but also being gathered and compact (as I might say) of the pure meal or flour sifted out of the best laws of all other countries. . . .'

Very interesting also is Sir Thomas Elyot's keen desire that lawyers should be men of high general education as well. He evidently did not agree with that narrow training which led to them being called *doctissimum genus indoctissimorum hominum.* Thus referring to Cicero, he says:—

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'Semblably Tully, in whom it seemeth that Eloquence hath set her glorious throne, most richly and preciously adorned for all men to wonder at, but no man to approach it, was not let from being an incomparable orator, he was not by exact knowledge of other sciences withdrawn from pleading infinite causes before the Senate and judges, and they being of most weighty importance. In so much as Cornelius Tacitus, an excellent orator, historian, and lawyer saith, Surely in the books of Tully, men may deprehend, that in him lacked not the knowledge of geometry, ne music, ne grammar, finally of no manner of art that was honest; he of logic perceived the subtlety, of that part that was moral all the commodity, and of all things the chief motives and causes.'

Other Articles are *A Brief Review of Criminal Cases in the Supreme Court of Illinois for the Past Year,* by Edwin R. Keely, and *The Uniform Negotiable Instruments law in the light of recent Criticism,* by Louis M. Greeley.

The *Harvard Law Review* for November commences with two *Appreciations,* by William H. Dunbar, and Roscoe Pound of Professor Ezra Ripley Thayer, who,—himself the son of James Bradley Thayer so well-known to all lawyers by his *Select Cases on Evidence* and other works,—succeeded Professor James Barr Ames as Dean of the Harvard Law School in 1910, and died on September 15th last, at the early age of forty-nine. Professor Thayer has left very few literary remains except a paper in the *Harvard Law Review* on a difficult point in the law of torts, and the Bar Association addresses, but Mr. Dunbar thus estimates the position he held in the field of scientific law:—

'Thayer had perhaps a finer legal mind than any man of his generation. Some might excel him in profound learning as to special subjects, some in subtlety of thought, some in forensic oratory. But none excelled him in the combination of perception, concentration, power of analysis, ability to grasp essential facts, understanding of fundamental principles, openness of mind, readiness to apprehend and accept or combat opposing views, united with capacity to apply all his powers and all his knowledge to the subject before him. His talents were such as assured and entitled him to his success as a practitioner, and his even greater growing success as a teacher and an educator. The same talents would equally

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have assured his success as a judge had he taken a place upon the Bench.'

Another valuable paper in this number of the *Harvard Law Review* is by Henry Bournes Higgins, who has been the President of the Australian Court of Conciliation and Arbitration since 1907, entitled *A New Province for Law and Order.* The new province is that of the relations between employers and employees; and the end to be aimed at is industrial peace through minimum wages and arbitration. The Australian Federal Constitution of 1900 gave the Commonwealth Parliament power to make laws with respect to 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State;' and in pursuance of this power, an Act was passed in 1904 constituting a Court of Conciliation, and where conciliation is found impracticable, arbitration. The arbitration is compulsory in the sense that an award, if made, binds the parties. The Act makes a strike or a lockout an offence if the dispute is within the ambit of the Act—*i.e.,* if the dispute is one that extends beyond the limits of one State. In other words the process of conciliation, with arbitration in the background is substituted for the rude and barbarous processes of strike and lockout. Judge Higgins explains the working of his Court, and his experiences as President, and amongst other things, formulates 33 propositions, which, he considers may be taken to be established in the settlement of minimum wages by the Court; and the formulation of these propositions, needless to say, give very special value to the learned judge's Article. We cannot do more here than quote the passage in which he answers the question—What is the net result of the Court of Arbitration?

'It will be asked, however, what is the net result of the Court of Conciliation? Have strikes ceased in Australia? The answer must be that they have not. There have been numerous strikes in Australia, as elsewhere. But since the Act came into operation there has been no strike extending "beyond the limits of any one State." Those who are old enough to recall the terrible shearers' strike and seamen's strike of the "nineties," with their attendant losses and privations, turbulence and violence, will realize how much ground has been gained. The strikes which still occur are strikes within a single

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State, and disputes within a single State are outside the jurisdiction of the Court. It can be safely said that, since the Act every dispute "extending beyond the limits of any one State" comes before the Court or the President, either on the application of parties to the dispute, or on the initiative of the officers of the Court. Moreover, with the exception of one doubtful case, in which I was not personally concerned and do not know the full particulars, there has been no instance of an award being flouted by the employees, no instance of the employees refusing to work under an award.'

The other Articles in the *Harvard Law Review* for November, are by Mr. Henry T. Terry, the author of *Leading Principles of Anglo-American Law on Negligence*, and by Mr. Wallace R. Lane on *Working Under Federal Equity Rules*. The latter is, of course, of more interest to lawyers in the United States, than in Canada. The former is an extremely lucid, clever, and analytical treatment of the law of negligence, and will well repay most careful study. The references are to American decisions; and American case law has wandered away on many points from our own. We are particularly struck by Mr. Terry's treatment of an interesting New York decision (*Eckert* v. *Long Island R. R. Co.*[3]). The plaintiff's intestate, seeing a child on a railroad track just in front of a rapidly approaching train, went upon the track to save him. He did save him, but was himself killed by the train. The jury were allowed to find that he had not been guilty of contributory negligence, on the ground that he had not exposed himself to an unreasonably great risk. The view taken was, it would seem, that the value of the collateral object—the saving of the life of the child—excused the risk to which the principal object was put, namely, the deceased's own life. Curiously enough our own Courts decided the other way in a precisely similar case some years ago: *Anderson* v. *Northern R. W. Co.*,[4] holding the deceased guilty of contributory negligence, his own direct and wilful act, however praiseworthy, being the cause of the accident. In *Connell* v. *Town of Prescott*[5] Boyd, C. says of the *Anderson case* that it "can hardly be regarded as one that should now be followed. At the end of his Article, Mr. Terry remarks that, while there is a negative duty of due

[3] 43 N. Y. 502 (1871).
[4] (1874) 25 C. P. 301.
[5] (1892) 20 A. R. at p. 52.

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care of very great generality, resting upon all persons and owed regularly to all persons, not to do negligent acts which are unreasonably dangerous to persons or tangible property, there is no affirmative duty of equal generality, *i.e.* no general duty to do acts, to take precautions, to prevent injury to others; but that affirmative duties to do acts to protect others arise only out of special circumstances in which the actor is placed." He then proceeds to enumerate, in a very useful way, the most important of those affirmative duties, and the kind of circumstances under which they arise. The usual *Notes, Recent Cases, and Book Reviews* conclude the number.

We have found so much to notice in our Exchanges this month, that any who have persevered to the end of this Article, deserves to be rewarded by two extracts in a lighter vein. We cull this, therefrom, from the *Criminal Law Review* (Madras):—

> 'An eminent lawyer was arguing a case when one of the judges composing the Bench was giving him frequent interruptions, and was crossing swords with him more often than necessary. After one hour's argument.
>
> Judge: Is that all you have to say?
>
> Lawyer: No, I have just begun, your lordship.
>
> Judge: What have you been doing till now?
>
> Lawyer: I have been listening to your lordship's argument.

And this from the *Central Law Journal*, of November 26th, which takes it from the *Monroe News-Star*:—

> NOTICE.
>
> I will not be responsible for any debts or contracts made by my wife, Mrs. Stella Ross.
>
> T. M. Ross.
>
> NOTICE.
>
> And that is why I am now in business at the Little Cash Store. Bring your little cash to the "Little Cash Store," where it is needed and appreciated. Phone 867.
>
> Mrs. Stella (T. M.) Ross.
>
> One would have supposed a man could have got on with a wife with so much humour as Mrs. Ross evidently possesses.

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THE BRITISH NORTH AMERICA ACT, 1915.

(IMP. 5 & 6. GEO. V., CH. 45).

Be it enacted by the King's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. Notwithstanding anything in the British North America Act, 1867, or in any Act amending the same, or in any Order in Council or terms or conditions of union made or approved under the said Acts or in any Act of the Canadian Parliament—

(i.) The number of senators provided for under section twenty-one of the British North America Act, 1867, is increased from seventy-two to ninety-six:

(ii.) The Divisions of Canada in relation to the constitution of the Senate provided for by section twenty-one of the said Act are increased from three to four, the fourth division to comprise the Western Provinces of Manitoba, British Columbia, Saskatchewan and Alberta, which four Divisions shall (subject to the provisions of the said Act and of this Act) be equally represented in the Senate as follows:—Ontario by twenty-four senators; Quebec by twenty-four senators; the Maritime Provinces and Prince Edward Island by twenty-four senators, ten thereof representing Nova Scotia, ten thereof representing New Brunswick, and four thereof representing Prince Edward Island; the Western Provinces by twenty-four senators, six thereof representing Manitoba, six thereof representing British Columbia, six thereof representing Saskatchewan, and six thereof representing Alberta:

(iii.) The number of persons whom by section twenty-six of the said Act the Governor-General of Canada may, upon the direction of His Majesty the King, add to the Senate, is increased from three or six to four or eight, representing equally the four divisions of Canada:

(iv.) In case of such addition being at any time made, the Governor-General of Canada shall not summon any person to the Senate except upon a further like direction by His Majesty the King on the like recommendation to represent one of the four Divisions until such Division is represented by twenty-four senators and no more:

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(v.) The number of Senators shall not at any time exceed one hundred and four:

(vi.) The representation in the Senate to which by section one hundred and forty-seven of the British North America Act, 1867, Newfoundland would be entitled, in case of its admission to the Union is increased from four to six members, and in case of the admission of Newfoundland into the Union, notwithstanding anything in the said Act, or in this Act, the normal number of senators shall be one hundred and two and their maximum number one hundred and ten:

(vii.) Nothing herein contained shall affect the powers of the Canadian Parliament under the British North America Act, 1886.

(2) Paragraphs (i.) to (vi.) inclusive of sub-section (1) of this section shall not take effect before the termination of the now existing Canadian Parliament.

2. The British North America Act, 1867, is amended by adding thereto the following section immediately after section fifty-one of the said Act:—

51a. Notwithstanding anything in this Act, a province shall always be entitled to a number of members in the House of Commons not less than the number of senators representing such province.

3. This Act may be cited as the British North America Act, 1915, and the British North America Acts, 1867 to 1886, and this Act may be cited together as the British North America Acts 1867 to 1915.

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MR. JUSTICE MASTEN AT COBOURG.

Some interesting addresses were made on the occasion of Mr. Justice Masten, opening the Cobourg Non-Jury Sittings on the 7th inst.

Mr. A. M. Peterson, on behalf of the Bar, said, in part, as follows:—"My Lord, I would like to make a few remarks on your first visit to our town of Cobourg. We have regarded your appointment to the judiciary from the start with very great satisfaction. . . I need not remind your lordship that the Bar of these United Counties has had among its number men of very high standing, men of eminence in different walks of life. Good lawyers, they achieved eminence in different walks, in their profession, statesmanship, and in whatever line of endeavour was open to them and that they attempted to pursue. They were good lawyers; many of them afterwards made judges of the very highest standing, whose judgments were regarded with very great favour, and while we rejoice in that position, and in this record and history of what those men did, it sometimes seems to us that it has placed a heavy burden upon us to retain and maintain what those men did, and that we have perhaps fallen short of the standard which they have given us. There is one way in which I do not think we are prepared to give place to them at all, and that is the regard in which we hold our profession, and our desire to maintain it in its purity. The aim and purpose of the Bar of these counties is, I believe, to attain just as high a standard of honour, and achieve just as much in the different walks of life, and to contribute as much to the benefit and welfare of their fellows. In all that they will give no place to any that have gone before. . . The Docket before your lordships to-day is a very moderate one. This may be attributed perhaps to the conditions prevailing throughout the Empire. . . I think perhaps that a larger number of men have been sent from Cobourg than any town of its size in the whole country, and our people are manifesting now I believe a deeper patriotism, and a more generous spirit in the welfare of the nation than they have ever done before."

Mr. D. B. Simpson, K.C., and Mr. F. M. Field, K.C., also spoke. The latter remarked that it was a matter of pride to him, as a fellow alumnus of "old Victoria" that his lordship had been selected by the government of Canada for high judicial office.

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Mr. Justice Masten, in the course of his reply, said:—

"So far as this particular Assize, and so far as this particular County Town is concerned, I quite appreciate all that has been said by Mr. Peterson and Mr. Simpson. This is not my first appearance in a Court room in Cobourg, nor my first experience of the law in this room. It is a curious fact that the first country assize at which I should preside should be in this room, because, in this room for the first time in my life I listened to a trial. I happened to be here, and was very much interested. It was a case of malicious prosecution before the late Mr. Justice Ferguson, and I sat here throughout the afternoon. I am not unfamiliar with the history and distinguished position which the Bar of Cobourg has held in the past, having had a personal acquaintanceship with the late Sir John D. Armour, and knowing from personal acquaintanceship or from reputation many of the other former members of the Bar, I have an appreciation of the very distinguished position which this Bar has held in the past. I have no doubt that its record will be a stimulus to all of you.

"With respect to the profession, and with respect to what Mr. Simpson said; times change, and we change with them. It would perhaps be impossible in the present juncture, and in the present day, to develop such a nisi prius lawyer as existed in the old days. As far as my own personal experience goes, the last of that famous generation has vanished, but it does not follow that the profession has degenerated. I think you can name men at the present time with as high ideals—and whose services to the public are equally as useful as any of those who lived in the days of old. They were fighting men in those days; they were accustomed to the technical, logical side and quick turns before the jury. The distinction of the present time is of an altogether different character. We have fallen upon commercial times, and now it is the guardianship of these large interests which distinguishes the profession. In former days they were less of diplomats, and had perhaps less capacity for taking care of large property interests, and adjusting differences with the least expense to the parties concerned. So, as I said, times change, and we change with them, and I have no doubt as far as the duties you have to fulfil in the practice of your profession, that they are quite as important and quite as well done as the duties of the great men to whom we look back."

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CORRESPONDENCE.[1]

NOVEMBER 12TH, 1915.

The Editor Canadian Law Times, Toronto:

SIR,—I have read with interest in your October number an extract from the Solicitors Journal dealing with the famous old legal novel "*Ten Thousand a Year,*" and your foot-note.

I have unearthed a copy in our Public Library, it is published by Blackwood and is, I think, an edition of 1854, and has some notes by the author, some explanatory, and some defending his law. Somewhere I have read a considerable discussion as to whether the famous deed which was refused in evidence because of the erasure should have been excluded. In the portion of the book describing the trial Mr. Quicksilver is mentioned with disparaging remarks, as also where the motion in term is described. Later on in the book in the second volume, at page 112, in describing the election between Titmouse and Delamere, Mr. Gammon is described as carefully preserving a letter franked 'Blossom & Box.' 'It was but a line written in a bold hand, but in undue haste for it had in fact been penned by Lord Blossom & Box while he was sitting in the Court of Chancery. This is a copy of it: "The election must be won," etc. B. & B. With the great man Lord Chancellor Blossom and Box, when plain Mr. Quicksilver, Mr. Gammon had had pretty full acquaintance.'

This of course identifies Mr. Quicksilver as Brougham and indeed other references show plainly who is meant. Such as allusions to Catholic Emancipation, various Societies, etc.

Of course the Solicitors Journal is wrong in speaking of Blossom and Box as a great advocate as he would cease to be such when he became Chancellor.

Somewhere I have read that 'the great name of Brougham and Vaux was but thinly disguised under the name of Blossom and Box.'

I have always supposed that Mr. Subtle was Scarlet, afterwards Lord Abinger, the others are probably likenesses too.

[1] The Editor hopes that the profession throughout Canada will help him to make our "Correspondence" a specially interesting feature of the C. L. T.

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I suppose the fact that the book is nearly extinct marks the passage of time which it is so hard to realize. I remember we used to have a copy in the office which I would recommend my students to read, because I always felt I picked up a good deal of legal atmosphere from reading it when a boy.

It does seem strange that a book evidently intended to shew the necessity of Law Reform should so unmerifully ridicule Lord Brougham who did so much for Law Reform, but Warren was evidently a ferocious Tory of the oldest of schools and abuses and caricatures everybody nearly who was not an old fashioned High Church Tory. Still one would think his book must have helped the men he was opposing.

You will remember one of the complaints against Lord Brougham was that he would write letters, etc., when he was hearing cases as Chancellor. I think in Lord Macaulay's Life and Letters we read that he went on the same circuit as Scarlet and Brougham and used to listen to them sparring in Court.

Please excuse the length of this letter.

If any further identification was required, of Lord Blossom & Box being Mr. Quicksilver made Lord Chancellor, it is furnished by the fact that he becomes Chancellor at the time of the passage of the Reform Bill.

Yours truly,

COUNTY COURT JUDGE.

Toronto, Dec. 11th, 1915.

Dear Sir:—

The Ontario Weekly Notes, published by the Law Society, are undoubtedly of great service to the profession. There is one way in which I think their usefulness could be increased; that is, by publishing a short note of the decisions of the Supreme Court of Canada on Appeal from the Courts of this province. If to that could be added a similar note respecting Privy Council Appeals, the profession would then have before them at an early date information as to the ultimate decisions in all Ontario cases.

Trusting that this suggestion may meet with your approval, I am,

Yours very truly,

JNO. T. SMALL.

Editor, *Canadian Law Times.*

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THE GAZETTES.

The *Canada Gazette* for November 6th last contains the appointment of a commission consisting of senators, members of parliament, merchants, manufacturers, and other gentlemen to consider, inquire into, and report upon, improved methods of production in Canada, especially agricultural production and the methods suitable to various localities; the distribution and transportation of products to home markets and the trade thus created between the several provinces of the Dominion; the transport of products to Canadian national ports and thence to markets abroad; the manufacture of such products in Canada; the opportunities for immigration with a view to inducing the settlement of an agricultural population upon the fertile uncultivated lands of both Western and Eastern Canada; the employment on their return to Canada of troops at the front; the obtaining of capital necessary for extending and developing agricultural and manufacturing industries and any kindred subjects which may seem directly connected therewith.

The *Canada Gazette* of November 13th last contains an Order-in-Council of November 11th, 1915, prohibiting the exportation of fish of all kinds, whether cured, salted or fresh, to all foreign countries in Europe, and on the Mediterranean and Black Sea, other than France, Russia (except through Baltic ports), Italy, Spain and Portugal.

It also contains an Order-in-Council of October 30th last prohibiting the exportation from Canada to foreign destinations (with the same exceptions) of all manufactures, and products of cotton, except cotton waste, which remains prohibited to all foreign destinations and cotton lace; also of furs, dressed or undressed, and manufactures thereof.

It also contains an Order-in-Council of October 29th last substituting amended Special Fishery Regulations for the Province of Ontario.

Also Orders-in-Council of October 27th last cancelling the electricity districts, and the gas inspection districts, as at present established, and defining districts established in lieu thereof.

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Also an Order-in-Council amending the Special Fishery Regulations for the province of New Brunswick.

The *Canada Gazette* of December 4th contains a proclamation invoking the Dominion Parliament to meet on January 15th next.

Also an Order-in-Council of November 25th last bringing Part II. of the Canada Temperance Act into force in the County of Brome.

Also a notice, dated November 25th last, that, until further notice, passports will be required from all British subjects, without exception, entering the United Kingdom.

The *Saskatchewan Gazette* of November 15th last announces that the Lieutenant-Governor in Council has appointed a central provincial committee to act in conjunction with the Federal Military Hospitals Commission in respect to a memorandum of suggestions dealing with the various problems involved in taking care of, and finding employment for, members of the Canadian Expeditionary Force who return to Canada during the period of the war.

The *Alberta Gazette* of the same date announces the appointment of a similar committee.

The *Manitoba Gazette* for October 30th last contains a somewhat unusual notice, that chapter 60 of the Statutes of Manitoba, 5 George V., intituled 'An Act to further amend the Sale of Shares Act,' as printed in the volume issued for 1915, is seriously defective by the omission of 3, as enacted by the legislature. The section enacts that, for the purpose of facilitating commercial, industrial, and mining undertakings in Manitoba, whenever it shall appear that a company whose undertaking, being of the nature aforesaid, has not been developed and that it is, therefore, not known that a fair return is promised upon its shares, stocks, bonds or securities so as to justify a certificate under section 10 of the Sale of Shares Act, the commissioner may, in his discretion, grant a special certificate in respect of the shares, stocks, bonds or securities of any such company, permitting the offer by the company to the public for purchase of shares, stocks, bonds or securities to be issued by the company, and the commissioner may, by the certificate, or subsequently,

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impose conditions and restrictions which shall be observed by the company or other persons in acting under such special certificate. There are certain subordinate sections.

The *Manitoba Gazette* of November 6th last, contains a proclamation calling into force a provincial Act, chapter 50 of 4 George V., intituled "An Act to Protect Horse Breeders in the Province of Manitoba."

The *Alberta Gazette* of October 30th last contains a proclamation calling into force chapter 6 of the Statutes of Alberta, 1915, being An Act respecting Public Utilities, authorising the creation of a Public Utility Commission, and prescribing its powers and duties.

The *British Columbia Gazette* of November 25th last contains an amendment of the Game Regulations, 1915, by rescinding the whole of paragraph 2 thereof, and substituting a new paragraph 2 in its place.

NEW BOOKS AND NEW EDITIONS.

The Law of the Constitution, by The Hon. W. H. P. Clement, B.A., LL.B. (Tor.), judge of the Supreme Court of British Columbia. Third Edition. Toronto: The Carswell Company, Limited, 1916. London: Sweet & Maxwell, Limited.

We have received the above just as we are going to press, and too late to notice at any length in our present issue. This we hope to do in our January or February number.

We have also received:—

The Monthly Bulletin of Economics and Social Intelligence of the International Institute of Agriculture for October, 1915. (Rome, U. S. A.).

The American Bar Association Journal for October, 1915. (Baltimore, Md.).

Two monthly numbers of the American Association for International Conciliation (New York) which contain a translation of Italy's Green Book, approved by the Royal Italian Embassy, Washington, D.C., and The Official Correspondence between the United States and Germany.

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LOCAL AND PERSONAL.

The Honourable W. J. Bowser, lately Attorney-General of British Columbia, has succeeded Sir Richard McBride as Premier of the province.

The Honourable M. F. Hackett, K.C., of Stanstead, has been appointed judge of the Superior Court for the District of Bedford, Quebec, *vice* Mr. Justice Lynch, resigned.

There are at the present time about 425 barristers practising in the province of Alberta, and of these about 225 are in the four cities of Calgary, Edmonton, Lethbridge and Medicine Hat, while the other 200 are divided among the towns and villages of the province. There are over 100 barristers in each of the cities of Edmonton and Calgary.

Miss Winnifred Marie Wilton, B.A., L.L.B., Manitoba's first lady lawyer, was called to the Bar of the province last month, who headed the list in the recent law examinations.

His Honour Judge Doyle, Senior Judge of the County of Huron, has resigned. There are also vacancies in the county judgeships of Renfrew, Prescott and Russell, Kent, Haldimand and Victoria, and Haliburton. For the Prescott and Russell vacancy, the probable appointment is C. G. O'Brien, K.C., of L'Orignal.

A. H. Goodall, of the firm of Bernard and Goodall, has gone to England to join the Imperial forces.

J. B. Caron, of the firm of Caron and Labelle, Ottawa, has also received a lieutenant's commission, and is now at the front in France.

Edward Lane, recently called to the Bar of British Columbia; J. A. Smith, of Russell, Macdonald, Hancox & Co., Vancouver, B.C., have joined the heavy artillery battery, now being organized at Queen's University.

The firm of Seaborn, Taylor, Pope and Quirk, of Moose Jaw, Sask., have contributed three of their body to the colours in the present war, namely, Captain Wallace E. Seaborn, Captain Frank Quirk, and Major Gentles.

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We cull the following from the New Glasgow (N.S.) News for the 15th ult.:—"Capt. J. Welsford McDonald, LL.B., accepts lower rank as lieutenant with the 85th Regiment and leaves to-day. Mr. McDonald has closed his office in New Glasgow, where he has had a large and growing law business, under the firm name of McDonald and McDonald, barristers. He is a son of E. M. McDonald, Esq., M.P., and had a bright future ahead in his chosen profession."

Joseph Langelier, formerly a barrister in Quebec, but who has been practising in the Yukon for the past fifteen years, has been appointed a stipendiary magistrate at White Horse.

J. L. Jennison, K.C., of the Alberta Bar, has been appointed senior judge of the District Court for the judicial district of Calgary, Alta.

Judge Archibald Bell, after 37 years' service as county judge of the county of Kent, has retired from the Bench, having reached the age limit of 75 years.

We regret to see the following deaths reported in the profession since our last issue[1]:—

Sir Frederick Eustache Barker, Chief Justice of New Brunswick, at St. John, N.B., on the 15th inst.

His Honour Thomas Moore Benson, Judge of the United Counties of Northumberland and Durham, at Port Hope, on the 15th inst.

Henry Bleecker, B.A., LL.B., late of Calgary, Alberta, and of Dawson City, and who, also, at one time, practised at Peterborough and Belleville, died at San Gabriel, California, on November 11th last.

H. Le Jeune, of Winnipeg, who sat as associate judge at the trial of Louis Reil, the rebel, in 1885, died at Winnipeg on November 22nd last.

[1] It is almost impossible to prevent occasional inaccuracies in the obituary column of the C. L. T. Corrections will be always gratefully received and duly recorded in our next issue.—Ed. C. L. T.

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